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# APPENDIX

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## Supreme Court of the United States

OCTOBER TERM, 1970

NO. 91

JOSEPH ARTHUR ZICARELLI,

*Appellant,*

vs.

THE NEW JERSEY STATE COMMISSION OF INVESTIGATION

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

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FILED FEBRUARY 16, 1970

PROBABLE JURISDICTION NOTED MARCH 1, 1971





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## Chronological List of Important Dates

- 7/8/69 Zicarelli first appears before State Commission of Investigation, pursuant to subpoena dated 6/12/69, and is directed to return on July 10.
- 7/10/69 Zicarelli appears before Commission, is questioned and refuses to answer most questions. He is excused until August 20, 1969.
- 8/19/69 Commission passes resolution authorizing statutory grant of immunity to Zicarelli.
- 8/20/69 Zicarelli appears before Commission, is granted immunity and refuses to testify.
- 8/20/69 Commission Chairman files a verified petition with Superior Court asking that Zicarelli be ordered to show cause why he should not be adjudged in contempt and committed to jail until he testifies.
- 8/20/69 Judge Kingfield of the Superior Court issues Order to Show Cause.
- 9/16/69 Hearing before Judge Kingfield on the Order to Show Cause.
- 9/18/69 Hearing continued before Judge Kingfield on the Order to Show Cause. Judge Kingfield finds Zicarelli in contempt and orders him committed to jail until he purges himself by testi-



*Chronological List of Important Dates*

- fyng as ordered. Commitment is stayed pending appeal.
- 9/22/69 Order is entered in accordance with ruling of September 18.
- 9/23/69 Notice of Appeal filed.
- 12/15/69 Case argued before Supreme Court of New Jersey.
- 1/20/70 Judgment affirmed by Supreme Court of New Jersey.
- 1/29/70 Notice of Appeal filed with Supreme Court.
- 2/16/70 Jurisdictional Statement filed.
- 3/2/71 Probable Jurisdiction noted.

**Subpoena****STATE COMMISSION OF INVESTIGATION****STATE OF NEW JERSEY****TRENTON, NEW JERSEY****IN THE NAME OF THE PEOPLE OF THE STATE  
OF NEW JERSEY****TO: JOSEPH ZICARELLI, 551 Brandon Place  
Cliffside Park, New Jersey**

*Subpoena*

You are hereby commanded to appear and attend before the STATE COMMISSION OF INVESTIGATION, STATE OF NEW JERSEY, at State Commission of Investigation, 329 West State Street, Trenton, New Jersey on the 8th day of July, 1969 at 10:00 o'clock in the forenoon, and on any adjourned dated thereof, to testify and give evidence as a witness at an Executive Hearing to be held in connection with an investigation conducted pursuant to Section 12, Chapter 266 of the 1968 Laws of the State of New Jersey, N.J.S. 52:9M-12.

A GENERAL STATEMENT of the subject of investigation being:

Whether the laws of New Jersey are being faithfully executed and effectively enforced in the City of Long Branch, New Jersey, with particular reference to organized crime and racketeering; whether public officers and public employees in the City of Long Branch and in Monmouth County where it is located, have been properly discharging their duties with particular reference to law enforcement and relations to criminal elements; and whether and to what extent criminal elements have infiltrated the political, economic and business life of those areas.

FAILURE TO ATTEND AND TO PRODUCE the items herein specified may subject you to contempt proceedings and to such other penalties as are prescribed by law.

WITNESS, Andrew F. Phelan, Executive Di-

*Subpoena*

rector for and on behalf of the STATE COMMISSION OF INVESTIGATION, STATE OF NEW JERSEY, this 12th day of June, 1969.

NOTICE TO WITNESS: In accordance with the provisions of Section 2, Chapter 376 of the 1968 laws of the State of New Jersey, N.J.S. 52:13E-2 of the Act establishing a code of fair procedure to govern state investigating agencies, you are herewith and hereby personally served with a copy of said act, a copy of the full text and provisions of which are set forth on the reverse side of this Subpoena.

NO. 130

**Excerpts of Transcript of Proceedings****STATE OF NEW JERSEY****STATE COMMISSION OF INVESTIGATION**

**IN THE MATTER OF THE INVESTIGATION OF  
LONG BRANCH AND MONMOUTH COUNTY, NEW  
JERSEY, WITH RELATION TO THE INFLUENCE  
OF ORGANIZED CRIME AND CORRUPTION IN  
THAT AREA.**

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**EXECUTIVE SESSION**

Testimony of:  
**JOSEPH A. ZICARELLI**

State House Annex  
Trenton, New Jersey  
August 20, 1969

*Excerpts of Transcript of Proceedings***BEFORE:**

**WILLIAM F. HYLAND, CHAIRMAN**  
**GLEN B. MILLER, JR., MEMBER**

**APPEARANCES:**

**ANDREW F. PHELAN, ESQ.,** Executive Director of the Commission.

**GARY GARDNER, ESQ.,** Counsel to the Commission.

**GEORGE P. DOYLE, ESQ.,** Counsel to the Commission.

**MICHAEL A. QUERQUES, ESQ.,** on behalf of Joseph A. Zicarelli.

**INDEX TO WITNESS**

Witness	Direct
JOSEPH A. ZICARELLI	4

**INDEX TO EXHIBITS**

Number		Evidence
C-3	Order to show cause	46
R-1	Letter dated July 8, 1969,	49



*Excerpts of Transcript of Proceedings*

[2] Whereupon,

JOSEPH A. ZICARELLI

recalled, previously sworn, testified as follows:

Chairman Hyland: The record will show the appearances of Commissioner Miller and myself, Commissioner Hyland, and that this is a continuation of a series of private hearings held by the Commission pursuant to a resolution adopted July 2, 1969. The record will show the presence of Mr. Doyle and Mr. Gardner as counsel to the Commission, the witness Joseph A. Zicarelli. Counsel, may we have your appearance.

Mr. Querques: Yes. My first name is Michael, middle initial A., last name Querques; address 501 Central Avenue, Orange.

Chairman Hyland: In what town?

Mr. Querques: Orange.

Chairman Hyland: Now, Mr. Zicarelli, when you were here previously you were represented by Daniel E. Isles, as I recall, is that correct?

The Witness: Yes.

Chairman Hyland: Do I understand now that your attorney with whom the Commission will deal in [3] the future is not Mr. Isles but is Mr. Querques?

Chairman Hyland: I want to hear it from the witness.

The Witness: Yes, sir.

Chairman Hyland: Because there are occasions when we will have to be in touch with counsel and I want to be sure that the

*Excerpts of Transcript of Proceedings*

witness understands that you are authorized to deal with us for him.

Mr. Querques: I think Mr. Zicarelli will tell you that any correspondence, any communication should be limited to myself and that the only reason why Mr. Isles appeared with Mr. Zicarelli on the last occasion or occasions was because I was in Europe and there was no way in the world I could get back but hereafter it will be strictly myself.

Chairman Hyland: Are you associated with Mr. Isles?

Mr. Querques: He is a law partner of mine but Mr. Zicarelli does not want him under any circumstances to ever be present with him and to represent him.

[4] Chairman Hyland: All right. That is not our responsibility. That is Mr. Zicarelli's.

Mr. Querques: Yes, but I thought if you wanted it on the record he would confirm what I told you.

Chairman Hyland: Mr. Zicarelli, you recall that you were previously sworn in the course of this investigation. Do you understand that your testimony today will be under that continuing oath?

The Witness: Yes, sir.

Chairman Hyland: All right, Mr. Gardner.

Direct Examination by Mr. Garner:

Q. Mr. Zicarelli, since your appearance before the Commission on July 10, 1969, have you spoken to

*Excerpts of Transcript of Proceedings*

anyone other than your attorney or attorneys regarding your testimony before the Commission?

Mr. Querques: I would advise Mr. Zicarelli not to answer that question for the reason that the question would not seem to be pertinent to the inquiry but I do think that he can tell you that if he was given any instructions, to the best of his ability he followed through with them.

[5] Chairman Hyland: Why don't we have him say that, Mr. Querques? I think there is no question it is pertinent because he was instructed not to discuss his previous testimony. Mr. Zicarelli, I am going to have this question repeated and ask you to answer it. Let's have the question repeated so that you fully understand it.

(The question was read by the Reporter.)

A. Not that I recall, no.

Q. Are you a member of any secret organization that is dedicated to or whose principle is to pursue crime and protect those of its members who do commit crime?

Mr. Querques: Mr. Chairman, with respect to this, and being appreciative of the fact that you may have gone through this before, but asking you to be appreciative of the fact that I was not present, may I respectfully and in very short fashion say that I have advised Mr. Zicarelli as to his rights but that as his attorney I think there

*Excerpts of Transcript of Proceedings*

are certain legal statements that I should make for the record. We take this position: That, first of all, the entire statute which is known as NJS 52:9M, Sections 1 through 17, are unconstitutional. [6] The second argument we would make, without spelling it out, is that even though the statute may be considered by the courts ultimately as being constitutional, that the implementation of those statutes is unconstitutional in that the subpoena process and the questioning process which took place before and which will take place today violate the witness' constitutional rights. Specifically, and without giving you any argument now but just listing them, but specifically with respect to the First Amendment and the witness' right of association; secondly, with respect to the Fourth Amendment and the witness' right of privacy; thirdly, with respect to the Fifth Amendment and the witness' rights under that amendment to be indicted if he is thought to have committed a crime, secondly under that precise section not to be compelled to be a witness against himself and thirdly under that specific section that he should not be deprived of any life, liberty or property without due process of law. The next part or the fourth part under the second argument that I make is that [7] it is a violation of the Sixth Amendment in that he is denied a trial by an impartial jury, he is denied the right to know the nature and cause of the accusation made against him, he is denied the right of confrontation, he is denied the right of com-



*Excerpts of Transcript of Proceedings*

pulsory process and he is denied the right of assistance of counsel.

Chairman Hyland: How is he deprived of assistance of counsel?

Mr. Querques: Well, he is denied, sir, the right of assistance of counsel in that if the proceeding is deemed to be in the nature of an accusation, he is denied the right of counsel in that counsel, while he is at Mr. Zicarelli's side, does not have the right to cross-examine anyone, he does not have the right to produce a witness, to produce evidence in his own behalf, so while counsel is here, counsel is in a legal way somewhat useless because he cannot bring all his talents to bear on the problem, so in that fashion I say that he is denied the effective assistance of counsel.

Chairman Hyland: Proceed.

[8] Mr. Querques: With respect to the statute which does not pertain at the present time, depending upon whether certain sections of the statute are enforced or attempted to be used against him, I think we can adequately argue under the Eighth Amendment that if the contempt processes are used it would amount to cruel and unusual punishment in violation of the Eighth Amendment. And lastly I say, most respectfully, that there is a violation here of the Fourteenth Amendment, due process clause. The third point we would like to make, without again spelling it out at length, unless you choose to question me about it, at which point I will be happy to give you answers, but we maintain that the statute is unconstitutional because of the immunity

*Excerpts of Transcript of Proceedings*

section. That immunity section, briefly, does not confer immunity with respect to any federal crime, it does not confer immunity with respect to any sister state crime, it does not confer immunity, if you please, with respect to any crime that could have been committed in another state. There is no provision in the statute to [9] prevent the attenuative use of any answer here given. As a matter of fact, the statute obligates the Commission to turn any answers or any evidence procured here over to other prosecuting authorities, including the federal, including sister states, and certainly to the New Jersey Attorney General and to any prosecutor in the state that could possibly use the information. With respect to the scope of this inquiry, based upon the questions that were asked of Mr. Zicarelli the last time as set forth to me, I would say that any questions along those same lines — most of them, if not all of them — would be beyond the scope of the inquiry as set forth, first of all, in the subpoena and, secondly, as set forth in the Commission's resolution. I think, sir, that that is all I would have to say at this time with respect to any constitutional objection that we would have regarding proceeding in this matter.

Chairman Hyland: Mr. Quérques, I think you can presume quite safely that the Commission has given consideration to many of the legal [10] arguments that you are raising at this time and, in fact, many of them, if not all of them, have been raised by other

*Excerpts of Transcript of Proceedings*

counsel in other proceedings. It isn't our function, obviously, to determine our own constitutionality. The Commission is operating to the best of its ability with its staff, with able counsel, in my opinion, operating thoroughly and within the framework of the legislative responsibilities that have been given to us. So I will explain at this time that we will proceed and your objection will of course be noted and that there will be a series of questions that Mr. Zicarelli will be asked. If it is his intention, as you have indicated, to refuse to answer those questions on the basis of his Fifth Amendment privilege, or whatever, after the first several questions we will try to shortcut that so that he can answer it in a shorter fashion and, by the same token, the directives I will give on behalf of the Commission with respect to the conferring of immunity will be shortcut.

Mr. Querques: I'm sorry, sir?

[11] Chairman Hyland: What I am trying to say, if we want to save time, Mr. Zicarelli's answers after we have received several, we will permit him to shorten those answers to "same answer," for example, if that is what he intends to convey. I want to explain on behalf of the Commission the implications of what we propose to do today and you will be given a copy at this time of what has been marked as Exhibit C-1 for today, which details the implications of the proposed grant of immunity. So, Mr. Zicarelli, when you are directed by me on behalf of the Commission to answer a question that

*Excerpts of Transcript of Proceedings*

you have refused to answer, upon compliance with the Commission's order to answer the question you shall be immune from having such responsive answer given by you or evidence derived therefrom used to expose you to criminal prosecution or penalty or to a forfeiture of your estate, except that you may nevertheless be prosecuted for any perjury committed in such answer or for contempt for failing to give a responsive answer in accordance with the order of the Commission, and any such answer given shall be [12] admissible against you upon any criminal investigation, proceeding or trial against you for such perjury or upon any investigation, proceeding or trial against you for such contempt. Now, your counsel has a copy of that. I want you to familiarize yourself with it and confer with counsel if you care to do so.

Mr. Querques: Mr. Chairman, may I have a moment to confer with Mr. Zicarelli? But before I do, may I ask you, respectfully, whether or not we will receive a copy of the transcript now being taken so as to in the future be prepared to explain why we may have taken a certain position with respect to certain questions inasmuch as you have indicated that the Commission is prepared to confer immunity.

Chairman Hyland: The answer to that will be yes, that you will be provided with a copy but at your own expense.

Mr. Querques: Right. And is it up to me to order it?



*Excerpts of Transcript of Proceedings*

Chairman Hyland: You can make those arrangements with Mr. Miele or his associate, Mr. Reading.

[13] Mr. Querques: Now, sir, just one last question. This document which has been marked Exhibit C-1, from which I think you have read the warning to Mr. Zicarelli, am I correct that it is from the statute known as 52:9M-17?

Chairman Hyland: Mr. Gardner.

Mr. Querques: Or, as you have it, Chapter 266 of the Laws of New Jersey 1968, Section 17?

Mr. Gardner: Is the question whether that is a verbatim excerpt from that statute?

Mr. Querques: Yes. It seems that it is.

Chairman Hyland: I assume that it would involve not only Chapter 266 of the laws of 1968 but Chapter 67 of 1969, or am I incorrect in my recollection of the amendment?

Mr. Gardner: I believe that is not an exact excerpt from the statute. However, I think —

Commissioner Miller: I have here, Mr. Querques, a copy of Section 17, if you care to look at it.

Mr. Querques: I have it, too, and I take it if the language is not verbatim it certainly is substantially the same.

[14] Chairman Hyland: What you have requested counsel for the Commission to do is furnish you with an explanation of the implications of the proposed grant of immunity as drawn from their analysis of the statute creating the Commission, which is Chapter 266.

*Excerpts of Transcript of Proceedings*

Mr. Querques: Yes. Well, that is what I am asking, is it an analysis or is the language essentially extracted from the statute?

Chairman Hyland: You will have to draw your own conclusions.

Mr. Querques: It strikes me as being extracted right from Section B of 52:9M-17.

Chairman Hyland: You draw your own conclusions about that, Mr. Querques.

Mr. Querques: All right. I think Mr. Gardner said it was substantially the same.

Chairman Hyland: I think the statute and the statement, C-1, will speak for themselves, so make whatever conclusions you want. Now, Mr. Miele, we will return to the question as posed to Mr. Zicarelli.

(The question was read by the Reporter.)

Chairman Hyland: What is your answer?

The Witness: On the advice of counsel I [15] invoke all my rights under the United States Constitution, especially my rights under the Fifth Amendment. Therefore I respectfully decline to answer the question on the ground it may tend to incriminate me.

Chairman Hyland: Are you finished?

The Witness: Yes.

Chairman Hyland: Now, I have given you the explanation and provided you with a copy of Exhibit C-1, which deals with the power of the Commission to award immunity, and based upon the immunity provision of the statute I am now directing you, Mr. Zicarelli, to answer that question.

*Excerpts of Transcript of Proceedings*

Mr. Querques: In connection with that, Chairman Hyland, may I ask you respectfully, in accordance with the law as I understand it, to explain the question to Mr. Zicarelli so that he and I both, for that matter, can understand the connective reasoning by which the answer to that question would be pertinent to your inquiry.

Chairman Hyland: No.

Mr. Querques: And with respect to that, sir, may I say that I believe that the authority [16] for asking you to do this would be contained in the case of Watkins against United States, reported at 354 U.S. 178, also at 1 Lawyers Edition 2d 1273, and to the same effect is the case of Scull against Virginia, reported in 359 U.S. 344 and 3 Lawyers Edition 2d 865 and, if I may, just one short excerpt out of Watkins says, reading from Page 1299 of 1 Lawyers Edition 2d, "It is the duty of the investigative body upon objection of the witness on the grounds of pertinency to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful the explanation must describe what the topic of the inquiry is and the connective reasoning whereby the precise questions asked relate to it." That is the basis upon which I ask you to explain it to me, sir, because, frankly, I don't understand it myself. I am in no position to explain it to him because, as I understand it, the investigation is confined to a geographical area known as Monmouth

*Excerpts of Transcript of Proceedings*

County.

Commissioner Miller: We are looking into [17], organized crime in Long Branch and in Monmouth County and this question is directed toward organized crime. Does that answer your question?

Mr. Querques: I understand that from the question itself but I don't see how Mr. Zicarelli's answer would relate to Monmouth County or to Long Branch.

Commissioner Miller: We have a series of questions and it will be connected up as we go along.

Mr. Querques: As we go along I would ask you to explain so that perhaps at the end it will become apparent because from the single question it does not seem apparent.

Commissioner Miller: If at the end there is still any doubt remaining in your mind, we can discuss the matter then.

Mr. Querques: All right, sir.

Chairman Hyland: Now, based upon the immunity provisions of the statute, Mr. Zicarelli, I am directing you to answer that question. What is your response?

The Witness: I refuse to answer for the same reasons.

[18] Chairman Hyland: Mr. Gardner.

By Mr. Gardner:

Q. Do you know that organization by the name Cosa Nostra?

A. I invoke all my rights under the United States Constitution and especially my rights under the Fifth Amendment, therefore I respectfully decline



*Excerpts of Transcript of Proceedings*

to answer the question on the ground it may tend to incriminate me.

Chairman Hyland: And for the reasons that I have explained before with respect to the immunity provisions, Mr. Zicarelli, I direct you on behalf of the Commission to answer that question. Do you refuse for the same reason?

The Witness: Yes, sir. V

Q. Mr. Zicarelli, I will ask you to speak up; I am having a lot of difficulty hearing you.

A. I will try.

Q. Are you a member of the organization known as Cosa Nostra?

Chairman Hyland: Now if you choose to make the same answer, Mr. Zicarelli, from this point on you can merely say "same reasons" and we will accept that, subject to the permission of your counsel, as being the [19] equivalent of the earlier answer you gave. Is that satisfactory?

Mr. Quergues: That is satisfactory. I think it is clear from the record that we all understand that whatever constitutional objections I have made are incorporated in Mr. Zicarelli's answer.

Chairman Hyland: All right. Now, with that explanation, Mr. Zicarelli, as to the Question that has been asked of you, what would your answer be?

The Witness: I refuse for the same reason.

*Excerpts of Transcript of Proceedings*

Chairman Hyland: Same answer?

The Witness: Yes.

Chairman Hyland: I direct you to answer on the same basis, Mr. Zicarelli.

The Witness: I refuse.

Chairman Hyland: Same answer?

The Witness: Yes.

Q. Do you have Cosa Nostra responsibilities in Monmouth County?

A. The answer is the same.

Chairman Hyland: I direct you to answer for the same reason.

The Witness: My answer is the same.

[20] Q. Have you ever visited Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Still the same.

Q. Did any such visits involve Cosa Nostra activities?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever conducted any Cosa Nostra business in Monmouth County?

A. Same answer.

*Excerpts of Transcript of Proceedings*

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Chairman Hyland: May I ask you a question at this point, Mr. Zicarelli. Have you ever heard the term "Cosa Nostra" used?

The Witness: Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Chairman Hyland: What is your understanding [21] of the meaning of the term "Cosa Nostra"?

The Witness: My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. In whose family of Cosa Nostra are you a member?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Do you know Joseph Bonanno?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever known Joseph Bonanno?

A. Same answer.

*Excerpts of Transcript of Proceedings*

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Are you now or have you ever been a member of Joseph Bonanno's Cosa Nostra Family?

A. My answer is the same.

Chairman Hyland: I direct you to answer on [22] the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Joseph Bonanno?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Carmine Galante?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Are you now or have you ever been a member of the Carlo Gambino Family?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.



*Excerpts of Transcript of Proceedings*

Q. Do you now or have you ever known Carlo Gambino?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

[23] The Witness: Same answer.

Q. Have you ever met with or spoken to Carlo Gambino?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis and, Mr. Zicarelli, will speak up so that we can all hear you, please.

The Witness: My answer is the same.

Chairman Hyland: Proceed.

Q. Have you ever met with or spoken to Paul Castellano?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Paolo Gambino?

Mr. Querques: May I have that first name?

Mr. Gardner: P-a-o-l-o.

A. My answer is the same.

Chairman Hyland: I direct you to answer

*Excerpts of Transcript of Proceedings*

on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to a Carmen Lombardozzi?

[24] A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Joseph Stacci, also known as Joe Rogers?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Are you now or have you ever been a member of the Vito Genovese Family?

A. My answer is still the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Vito Genovese?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

*Excerpts of Transcript of Proceedings.*

Q. Have you ever met with or spoken to Thomas Eboli, also known as Tommy Ryan?

A. My answer is the same.

[25] Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Gerardo Catena, also known as Jerry Catena?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Ruggerio Boiardo, also known as Richie the Boot?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same.

Q. Have you ever met with or spoken to Anthony Boiardo, also known as Tony Boy?

A. Same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Have you ever met with or spoken to Joseph Valachi, also known as Cago?

A. My answer is the same.

*Excerpts of Transcript of Proceedings*

Chairman Hyland: I direct you to answer on [26] the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Carmine Persico, Jr.?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Pasquale Erra, also known as Patsy, also known as Little Patty?

Mr. Querques: May I have the spelling for Erra, please?

Mr. Gardner: E-r-r-a.

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same, sir.

Q. Have you ever met with or spoken to Harold Konigsberg, also known as Kayo?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.



*Excerpts of Transcript of Proceedings*

Q. Have you ever met with or spoken to Angelo DeCarlo, also known as Gyp, also known as Ray?  
[27] A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Are you now or have you ever been a member of the Sam DeCavalcante Family of Cosa Nostra?  
A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

A. Have you ever met with or spoken to Sam DeCavalcante, also known as Sam the Plumber?  
A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same.

Q. Have you ever met with or spoken to Frank Cocchiaro, also known as Frank Condi?  
A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Do you know the present whereabouts of Frank Cocchiaro?  
A. My answer is the same.

*Excerpts of Transcript of Proceedings*

[28] Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you seen Frank Cocchiaro since he testified before this Commission.

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Robert Occhipinti, also known as Bobby Basile?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Have you ever met with or spoken to Anthony Russo, also known as Little Pussy?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Do you know any of the above-named individuals to be members of the Cosa Nostra?

A. My answer is the same, sir.

Chairman Hyland: I direct you to answer on [29] the same basis.

The Witness: Same answer.

*Excerpts of Transcript of Proceedings*

Q. Do you know any of those above-named individuals to have conducted Cosa Nostra activities in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Do you know any of those above-named individuals to have Cosa Nostra responsibilities in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is still the same.

Q. Have you ever given any of the above-named individuals orders to be carried out in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is still the same.

Q. Have any of those above-named individuals ever given you orders to be carried out in Monmouth County?

A. My answer is the same.

[30] Chairman Hyland: I direct you to answer on the same basis.

*Excerpts of Transcript of Proceedings*

The Witness: Still the same..

Q. Do you know that Long Branch, New Jersey is situated in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever spoken to any public officials in Long Branch, New Jersey?

A. My answer is still the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Have you ever spoken to any of them about the performance of their official duties?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever given anyone orders to speak to public officials in Long Branch, New Jersey about the performance of their official duties?

A. Same answer.

[31] Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.



*Excerpts of Transcript of Proceedings*

Q. Have you ever paid any money or authorized payment of any money to any public officials in Long Branch, New Jersey?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Still the same.

Q. Do you know of the payment of any money to public officials in Long Branch, New Jersey?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Still the same.

Q. Do you know of the payment of any money to public officials in Long Branch?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. How long have you been a member of Cosa Nostra?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. What rank do you hold?

A. Same answer.

*Excerpts of Transcript of Proceedings*

Chairman Hyland: I direct you to answer on [32] the same basis.

The Witness: Same answer.

Q. In what geographical area do you have Cosa Nostra responsibilities?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Still the same answer.

Q. Is Monmouth County within that geographical area?

A. Still the same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Within the hierarchy of the Cosa Nostra who is your immediate superior?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Still the same.

Q. Who do you have working for you in Cosa Nostra?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is still the

*Excerpts of Transcript of Proceedings*

same.

[33] Q. Do any of those people who are subservient to you reside in Monmouth County?

A. My answer is still the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Still the same.

Q. Do any of your superiors in Cosa Nostra reside in Monmouth County?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer, sir.

Q. Is Anthony Russo a member of Cosa Nostra?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Is Frank Cocchiaro a member of Cosa Nostra?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Is Robert Occhipinti a member of Cosa

*Excerpts of Transcript of Proceedings*

Nostra?

A. My answer is the same.

Chairman Hyland: I direct you to answer on [34] the same basis.

The Witness: Same answer.

Q. Is Bobby Basile a member of Cosa Nostra?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Is Louis Ferrari a member of Cosa Nostra?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Have you ever met with or spoken to Louis Ferrari?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Anthony Agnellino, also known as Tony Dale?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.



*Excerpts of Transcript of Proceedings*

The Witness: My answer is the same.

Q. Is he a member of Cosa Nostra?

[35] A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Atilio Agnellino, also known as Artie Agnellino?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Is he a member of Cosa Nostra?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. I have just asked you about Anthony Russo, Frank Cocchiaro, Robert Occhipinti, also known as Bobby Basile, Louis Ferrari, Anthony Agnellino and Atilio Agnellino. Do any of those individuals have Cosa Nostra responsibilities in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

*Excerpts of Transcript of Proceedings*

Q. How many families of Cosa Nostra are there [36] represented in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Is it part of Cosa Nostra's activities and aims to corrupt politicians in Monmouth County and in Long Branch?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. In the terminology of Cosa Nostra do you know the meaning of the term "ice"?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. What is the meaning of the term "ice"?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Without giving specific examples, can you tell me whether you know of payments of ice to any [37] individuals in Long Branch, New Jersey?

*Excerpts of Transcript of Proceedings*

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Do you exercise any power in any labor unions situated in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Chairman Hyland: Or in any way with unions, Mr. Zicarelli, that have activities in Monmouth County?

The Witness: My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Is it part of the function of members of Cosa Nostra to insinuate themselves into the hierarchy of labor unions in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same, sir.

[38] Q. Is it part of the function of members of Cosa Nostra to invest monies in ostensibly legitimate businesses in Monmouth County?

A. My answer is the same.

*Excerpts of Transcript of Proceedings*

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. In the normal course of affairs do members of Cosa Nostra give orders directly to people who are not members of Cosa Nostra?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Within the terminology of Cosa Nostra what does the term "family" mean?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. What does the term "griemeson" mean?

Mr. Querques: May I have the spelling of that?

Mr. Gardner: G-r-i-e-m-e-s-o-n.

Mr. Querques: Is that an English word or [39] foreign word?

Mr. Gardner: Perhaps your client can tell us.

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.



*Excerpts of Transcript of Proceedings*

The Witness: Same answer.

Q. In the jargon of Cosa Nostra what does the term "boss" mean?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. What does the term "underboss" mean?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. What does the term "caporegima" mean?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. What does the term "consigliari" mean?

A. My answer is the same.

Chairman Hyland: I direct you to answer on [40] the same basis.

The Witness: Same answer.

Q. What does the term "lieutenant" mean?

A. My answer is the same.

Chairman Hyland: I direct you to answer

*Excerpts of Transcript of Proceedings*

on the same basis.

The Witness: Same answer.

Q. What does the term "soldier" mean?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Within the terms of Cosa Nostra what does the term "commission" mean?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Which of the members of the commission of the Cosa Nostra can you identify?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Who is the boss of your Cosa Nostra Family?

[41] A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Who is the underboss?

A. Same answer.

*Excerpts of Transcript of Proceedings*

Chairman Hyland: I direct you to answer on the same basis

The Witness: Same answer.

Q. Who is the consigliari?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Who is the caporegima to whom you are responsible?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Which of the members of the hierarchy of your family just asked about reside in Monmouth County?

A. The answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

[42] The Witness: Same answer.

Q. Which of them conduct business in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

*Excerpts of Transcript of Proceedings*

Q. Which of them have influence in labor unions in Monmouth County?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Which of them have Cosa Nostra responsibilities in Monmouth County?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Have you ever told anyone you are a member of Cosa Nostra?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

[43] Q. Have you ever talked to anyone in such a way as to suggest that you were a member of Cosa Nostra?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Are you also known as Bayonne Joe?

A. My answer is the same.



*Excerpts of Transcript of Proceedings*

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Mr. Phelan: Mr. Chairman, that will complete our questions at this time. However, on the record, I would like the record to reflect that I am now serving on Mr. Querques an order to show cause and petition requesting adjudication of contempt for Mr. Zicarelli, also incarceration until such time as he answers the questions which have been propounded to him. The order to show cause is returnable forthwith before Judge Kingfield at Room 348 on this floor.

Mr. Querques: Mr. Hyland, before we leave, may I renew what I said initially and that is, would you explain how some of these [44] questions relate to the subject matter as set forth both in the resolution and in the subpoena? There are certain questions in here which make it obvious that the Commission is accusing or suggesting, at least, that Mr. Zicarelli is a member of Cosa Nostra and that he is familiar with its workings, if indeed there is such an organization. If that information is available to the Commission, I fail to see why the Commission shouldn't answer the question. If they have no basis for answering the questions because we already have the answers, I would think therefore the questions are not pertinent. In addition to that, I think that it becomes necessary to know the source of the information that gives rise or gives basis or foundation to the questions, because if



*Excerpts of Transcript of Proceedings*

these questions result or find their foundation from the existence of certain tapes which allegedly come from the premises of an office occupied by Mr. Samuel DeCavalcante, I think then there is another objection that can be raised, which I have not heretofore raised but which I suppose has been raised in general fashion. [45] Now, it may be that after Mr. Zicarelli has your explanation as to how these questions are pertinent and how the answers or what the connective reasoning is with respect to the questions that make them pertinent, he might want to review his position. I respectfully ask you, sir, to give us that explanation.

Chairman Hyland: Well, I respectfully suggest that the record is quite clear in showing the relationship of these questions to the inquiry into Monmouth County and Long Branch and I doubt very seriously, Mr. Querques, that this reflection you just referred to on the part of your client would result in any different responses on any given day. He has been asked very direct questions with regard to Long Branch and Monmouth County and refused to answer every one.

Mr. Querques: I frankly don't understand. Are you suggesting, Mr. Hyland, that no matter what, he will take the same position, that he is somewhat of an incorrigible witness?

Chairman Hyland: I am not taking that position. The record is there, Mr. Quer-

*Excerpts of Transcript of Proceedings*

ques [46]. and you make of it what you will. I will ask the Reporter, if he has not already done so, to mark a copy of the order to show cause which has been directed to Mr. Zicarelli as Exhibit C-3 for today.

(Exhibit C-3 was received in evidence.)

\* \* \*

**Order to Answer Question - Exhibit C-1**

You are hereby ordered and directed by the State Commission of Investigation pursuant to the authority granted by Chapter 266, Laws of New Jersey, 1968, Section 17, and by Resolution of a majority of all the members of the Commission, to answer the question.

Upon compliance with this order, you shall be immune from having such responsive answer given by you, or evidence derived therefrom used to expose you to criminal prosecution or penalty or to a forfeiture of your estate, except that you may nevertheless be prosecuted for any perjury committed in such answer, or for contempt for failing to give responsive answer in accordance with the order of the Commission; and any such answer given shall be admissible against you upon any criminal investigation, proceeding or trial against you for such perjury, or upon any investigation, proceeding or trial against you for such contempt.

**Verified Petition (Zicarelli)**

(Filed 8/20/69)

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, MERCER COUNTY  
DOCKET NO.**

In the Matter of :  
**JOSEPH ARTHUR ZICARELLI** :  
 charged with Civil Contempt of :  
 the State Commission of In- :  
 vestigation :

State of New Jersey: SS

County of Mercer :

**WILLIAM F. HYLAND**, of full age, having been duly sworn upon his oath, deposes and says:

1. I am the Chairman of the State Commission of Investigation (hereinafter "Commission"), State of New Jersey, with offices at 329 West State Street, Trenton, New Jersey, and am authorized to make this petition on behalf of the Commission.

2. Pursuant to the authority granted in Chapter 266, Laws of New Jersey 1968, as amended by Chapter 67, Laws of New Jersey 1969, N.J.S.A. 52:9M-1 to 18 (hereinafter N.J.S.A. 52:9M-1 to 18), Sections 2, 11 and 12, the Commission commenced an investigation into certain matters involving the City of Long Branch and the County of Monmouth, New Jersey, in April of 1969. Through its own investigative efforts, the Com-

*Verified Petition (Zicarelli)*

mission amassed considerable information about JOSEPH ARTHUR ZICARELLI.

3. On July 2, 1969, the Commission passed a resolution, a copy of which is annexed hereto and made a part hereof as "Exhibit A", authorizing the commencement of hearings on July 8, 1969, pursuant to N.J.S.A. 52:9M-2 and 12, into certain matters in Long Branch, and in Monmouth County, New Jersey.

4. In accordance with N.J.S.A. 52:9M-12(c), the Commission caused a subpoena, a copy of which is annexed hereto and made a part hereof as "Exhibit B", to be served upon JOSEPH ARTHUR ZICARELLI, requiring him to appear before the Commission on July 8, 1969, and on any adjourned date thereof to testify and give evidence as a witness at an Executive Hearing.

5. Pursuant to the command of "Exhibit B", JOSEPH ARTHUR ZICARELLI appeared before the Commission hearing on July 8, 1969. He was directed to return on July 10, 1969. He did so and was questioned by the Commission. I have been advised by ANDREW F. PHELAN, Executive Director of the Commission, that all questions propounded to JOSEPH ARTHUR ZICARELLI were derived from sources wholly independent of the Federal Bureau of Investigation logs of electronic surveillance filed with the Clerk of the United States District Court, Newark, in the case of United States v. DeCavalcante.

6. At the hearing of July 10, 1969, JOSEPH



*Verified Petition (Zicarelli)*

ARTHUR ZICARELLI invoked his privilege against self-incrimination and refused to answer any of the substantive questions posed to him by the Commission. The Commission excused him until subpoena.

7. I have been advised by KENNETH P. ZAUBER, Counsel for the Commission, that by letters dated August 15, 1969, and served by certified mail on that date, copies of which are annexed hereto and made a part hereof as "Exhibit C" and "Exhibit D", the Attorney General of the State of New Jersey and the Prosecutor of Hudson County, respectively, were advised of the Commission's intention to compel testimony from JOSEPH ARTHUR ZICARELLI by granting him immunity from prosecution and of the availability of the Commission to hear any objections to its proposed immunization of this witness. The Attorney General and the Prosecutor of Hudson County have interposed no objections to the proposed immunization of this witness.

8. On August 19, 1969, the Commission passed a Resolution, a copy of which is annexed hereto and made a part hereof as "Exhibit E" pursuant to N.J.S.A. 52:9M-17(a) authorizing the compulsion of testimony from and the grant of immunity from prosecution to JOSEPH ARTHUR ZICARELLI.

9. On August 20, 1969, the adjourned return date of "Exhibit B", JOSEPH ARTHUR ZICARELLI appeared before an Executive Hearing of the Commission and again refused to answer the questions posed by the Commission, having invoked



*Verified Petition (Zicarelli)*

his privilege against self-incrimination.

10. Pursuant to N.J.S.A. 52:9M-17 and "Exhibit E", the Commission ordered JOSEPH ARTHUR ZICARELLI to answer the questions propounded to him and conferred immunity upon him.

11. Although he had been ordered to answer the questions propounded and immunity had been conferred upon him, JOSEPH ARTHUR ZICARELLI still refused to answer the questions asked of him.

WHEREFORE, your petitioner prays that JOSEPH ARTHUR ZICARELLI be ordered to show cause why he should not be adjudged in contempt and committed to the Mercer County Jail until such time as he purges himself of contempt by testifying as ordered.

DATED: Trenton, New Jersey; August 20, 1969.

s/ William F. Hyland  
WILLIAM F. NYLAND, Chairman  
State Commission of Investigation  
State of New Jersey

**Exhibit A - Resolution Annexed To Foregoing  
Verified Petition**

**RESOLUTION**

**RESOLVED**, that the New Jersey State Commission of Investigation, commencing July 8, 1969, and thereafter until concluded, shall hold a private hearing in order to determine whether the laws of New Jersey are being faithfully executed and effectively enforced in the City of Long Branch, New Jersey, with particular reference to organized crime and racketeering; whether public officers and public employees in the City of Long Branch and in Monmouth County where it is located, have been properly discharging their duties with particular reference to law enforcement and relations to criminal elements; and whether and to what extent criminal elements have infiltrated the political, economic and business life of those areas; and be empowered to enlarge upon the scope of the hearing from time to time as circumstances may justify.

Further **RESOLVED** that COMMISSIONER WILLIAM F. HYLAND be designated to preside over such hearing and be empowered to designate any other member of the Commission to preside in his place over such hearing from time to time as circumstances may warrant.

Further **RESOLVED** that the Presiding Commissioner shall be empowered to adjourn the hearing from time to time to such other place or places as the circumstances may warrant.

*Exhibit A - Resolution Annexed To Foregoing  
Verified Petition*

Further RESOLVED that the Presiding Commissioner shall be empowered to adjourn the hearing from time to time to such other place or places as the circumstances may warrant.

Further RESOLVED that COMMISSIONER GLEN B. MILLER, JR., be designated to participate with COMMISSIONER HYLAND in the conduct of the hearing, and that the Presiding Commissioner shall be empowered from time to time, as circumstances warrant, to designate one or more of the remaining Commissioners to participate in the conduct of the hearing.

Further RESOLVED that the Presiding Commissioner advise each witness and other persons participating in the hearing, of the limitations upon August 20, 1969, to appear and testify again under disclosure of information provided for in Section 15 of the New Jersey State Commission of Investigation Act.

Further RESOLVED that, in the discretion of the majority of the members of the Commission, manifested either orally or in writing, a public hearing may be convened at any time or times deemed appropriate with respect to the subject matters set forth above.

51a

*Exhibit A - Resolution Annexed To Foregoing  
Verified Petition*

**CERTIFICATION**

The undersigned Executive Director of the New Jersey State Commission of Investigation does hereby certify that the above RESOLUTION was adopted at a duly constituted meeting of the Commission held on July 2, 1969, in fulfillment of the requirements of the Act establishing the Commission.

s/ Andrew F. Phelan  
ANDREW F. PHELAN



**Exhibit B - Subpoena Annexed To Foregoing  
Verified Petition**

**STATE COMMISSION OF INVESTIGATION**

**STATE OF NEW JERSEY**

**TRENTON, NEW JERSEY**

**IN THE NAME OF THE PEOPLE OF THE STATE  
OF NEW JERSEY**

**TO: JOSEPH ZICARELLI, 551 Brandon Place  
Cliffside Park, New Jersey**

You are hereby commanded to appear and attend before the STATE COMMISSION OF INVESTIGATION, STATE OF NEW JERSEY, at State Commission of Investigation, 329 West State Street, Trenton, New Jersey on the 8th day of July, 1969 at 10:00 o'clock in the forenoon, and on any adjourned date thereof, to testify and give evidence as a witness at an Executive Hearing to be held in connection with an investigation conducted pursuant to Section 12, Chapter 266 of the 1968 Laws of the State of New Jersey, N.J.S. 52:9M-12.

**A GENERAL STATEMENT of the subject of investigation being:**

Whether the laws of New Jersey are being faithfully executed and effectively enforced in the City of Long Branch, New Jersey, with particular reference to organized crime and racketeering; whether public officers and public employees in the City of Long Branch and in Monmouth County



*Exhibit B - Subpoena Annexed To Foregoing  
Verified Petition*

where it is located, have been properly discharging their duties with particular reference to law enforcement and relations to criminal elements; and whether and to what extent criminal elements have infiltrated the political, economic and business life of those areas.

FAILURE TO ATTEND AND TO PRODUCE the items herein specified may subject you to contempt proceedings and to such other penalties as are prescribed by law.

WITNESS, Andrew F. Phelan, Executive Director for and on behalf of the STATE COMMISSION OF INVESTIGATION, STATE OF NEW JERSEY, this 12th day of June, 1969.

By (signed) Andrew F. Phelan Executive Director  
Andrew F. Phelan

NOTICE TO WITNESS: In accordance with the provisions of Section 2, Chapter 376 of the 1968 laws of the State of New Jersey, N.J.S. 52:13E-2 of the Act establishing a code of fair procedure to govern state investigating agencies, you are herewith and hereby personally served with a copy of said act, a copy of the full text and provisions of which are set forth on the reverse side of this Subpoena.

**Exhibit C - Letter Dated August 15, 1969 to  
Attorney General Sills Annexed to Foregoing  
Verified Petition**

August 15, 1969

Honorable Arthur J. Sills  
Attorney General  
State House  
Trenton, new Jersey

Attention: Edwin H. Steir, Co-Director  
Peter Richards, Co-Director  
Organized Crime Unit  
c/o New Jersey State Police  
Post Office Box 68  
West Trenton, New Jersey

Re: Proposed Order to Compel the Testimony of  
and Grand Immunity to JOSEPH ARTHUR  
ZICARELLI, ANTHONY RUSSO and  
ANGELO DeCARLO,

Sirs:

The State Commission of Investigation proposes to compel the testimony of Joseph Arthur Zicarelli, Anthony Russo and Angelo DeCarlo, witnesses before a Commission hearing and to compel them to produce evidence. Pursuant to Section 17 of the Act creating the State Commission of Investigation, Chapter 266, Laws of New Jersey, 1968, the Commission may order a recalcitrant witness to answer questions and produce evidence by conferring immunity upon him.

*Exhibit C - Letter Dated August 15, 1969 to  
Attorney General Sills Annexed to Foregoing  
Verified Petition*

The scope of investigation with respect to which the proposed immunity is directed concerns whether the laws of New Jersey are being faithfully executed and effectively enforced in the City of Long Branch, New Jersey, with particular reference to organized crime and racketeering; whether public officers and public employees in the City of Long Branch and in Monmouth County where it is located, have been properly discharging their duties with particular reference to law enforcement and relations to criminal elements; and whether and to what extent criminal elements have infiltrated the political, economic and business life of those areas.

Section 17 of the Act requires that the Attorney General and the appropriate county prosecutor shall be given at least twenty-four hours written notice of the Commission's intention to issue an order compelling testimony and conferring immunity, and be given an opportunity to be heard with respect to any objections they or either of them may have to the granting of immunity to any witness.

The purpose of this letter is to advise you of the Commission's intention to issue an order compelling testimony from Joseph Arthur Zicarelli, Anthony Russo and Angelo DeCarlo and conferring immunity upon them. In the event that you have any objection to the proposed orders of the Commission, please advise the Commission immediately. Should you wish to be heard on any objection

*Exhibit C - Letter Dated August 15, 1969 to  
Attorney General Sills Annexed to Foregoing  
Verified Petition*

to the proposed grant of immunity, the Commission will be meeting at 10:00 A.M., Tuesday morning, August 19, 1969, at 329 West State Street, Trenton, New Jersey, to hear any objection.

Very truly yours,

STATE COMMISSION OF  
INVESTIGATION

KENNETH P. ZAUBER  
Counsel



**Exhibit D - Letter Dated 8/15/69 to Prosecutor  
Quinn Annexed to Foregoing Verified Petition**

August 15, 1969

Honorable James F. Quinn  
Prosecutor of Hudson County  
Hudson County Courthouse  
Jersey City, New Jersey 07306

Re: Proposed Order to Compel the Testimony  
of and Grant Immunity to JOSEPH ARTHUR  
ZICARELLI

Dear Mr. Quinn:

The State Commission of Investigation proposes to compel the testimony of JOSEPH ARTHUR ZICARELLI, witness before a Commission hearing and to compel him to produce evidence. Pursuant to Section 17 of the Act creating the State Commission of Investigation, Chapter 266, Laws of New Jersey, 1968, the Commission may order a recalcitrant witness to answer questions and produce evidence by conferring immunity upon him.

The scope of investigation with respect to which the proposed immunity is directed concerns whether the laws of New Jersey are being faithfully executed and effectively enforced in the City of Long Branch, New Jersey, with particular reference to organized crime and racketeering; whether public officers and public employees in the City of Long Branch and in Monmouth County where it is located, have been properly discharging their duties with particular reference to law enforcement and relations to criminal elements, and wheth-



*Exhibit D - Letter Dated 8/15/69 to Prosecutor  
Quinn Annexed to Foregoing Verified Petition*

er and to what extent criminal elements have infiltrated the political, economic and business life of those areas.

Section 17 of the Act requires that the Attorney General and the appropriate county prosecutor shall be given at least twenty-four hours written notice of the Commission's intention to issue an order compelling testimony and conferring immunity, and be given an opportunity to be heard with respect to any objections they or either of them may have to the granting of immunity to any witness.

The purpose of the letter is to advise you of the Commission's intention to issue an order compelling testimony from Joseph Arthur Zicarelli and conferring immunity upon him. In the event that you have any objection to the proposed order of the Commission, please advise the Commission immediately. Should you wish to be heard on any objection to the proposed grant of immunity, the Commission will be meeting at 10:00 A.M. Tuesday morning, August 19, 1969, at 329 West State Street, Trenton, New Jersey, to hear any objection.

Very truly yours,

STATE COMMISSION OF  
INVESTIGATION

KENNETH P. ZAUBER  
Counsel

**Exhibit E - Resolution Annexed to Foregoing  
Verified Petition**

**RESOLUTION OF THE  
STATE COMMISSION OF INVESTIGATION  
TO COMPEL TESTIMONY FROM AND CONFER  
IMMUNITY UPON JOSEPH ARTHUR ZICARELLI**

WHEREAS, the State Commission of Investigation authorized an investigation into certain matters involving the City of Long Branch, and County of Monmouth, New Jersey, by resolution adopted July 2, 1969; and

WHEREAS, JOSEPH ARTHUR ZICARELLI was subpoenaed as a witness in the course of such investigation at a hearing held by the State Commission of Investigation on July 8, 1969, and was instructed to return on July 10, 1969; and,

WHEREAS, JOSEPH ARTHUR ZICARELLI refused to answer questions propounded to him at said hearing on July 10, 1969;

NOW, THEREFORE, BE IT RESOLVED by the State Commission of Investigation that JOSEPH ARTHUR ZICARELLI be ordered to answer all questions henceforth propounded to him by the State Commission of Investigation pursuant to Commission Resolution adopted on July 2, 1969, and that immunity be conferred upon him pursuant to Section 17 of the Act creating the State Commission of Investigation, Chapter 266, Laws of New Jersey, 1968.

*Exhibit E - Resolution Annexed to Foregoing  
Verified Petition*

**CERTIFICATION**

The undersigned Executive Director of the New Jersey State Commission of Investigation does hereby certify that the above RESOLUTION was adopted by a majority of the Commission at a duly constituted meeting of the Commission held on August 19, 1969, in fulfillment of the requirements of the Act establishing the Commission.

/s/ Andrew F. Phelan  
ANDREW F. PHELAN

**Order to Show Cause**

(Filed 8/20/69)

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, MERCER COUNTY  
DOCKET NO.**

In the Matter of  
**JOSEPH ARTHUR ZICARELLI** charged  
with Civil Contempt of the  
State Commission of Investigation.

This matter coming on to be heard through the verified petition of **WILLIAM F. HYLAND**, Chairman of the State Commission of Investigation, for an order adjudging **JOSEPH ARTHUR ZICARELLI** in contempt and committing him to the Mercer County jail until such time as he purges himself of contempt by testifying before the State Commission of Investigation as ordered, and the Court having considered the verified petition of the State Commission of Investigation and the exhibits annexed thereto.

It is, on this 20th day of August, 1969,

**ORDERED** that **JOSEPH ARTHUR ZICARELLI** show cause before this Court at the State House Annex, Room 348, Trenton, New Jersey, forthwith, why he should not be adjudged in contempt and committed to the Mercer County Jail until such time as he purges himself of contempt by testifying as ordered.

**DATED:** Trenton, New Jersey: August 20, 1969.

s/ **Frank J. Kingfield**



**Excerpts of Transcript of Motion**

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION : MERCER COUNTY  
DOCKET NOS. L-39097-68  
L-41598-68 and L-41599-68**

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**In the Matters of  
ROBERT OCCHIPINTI, ANTHONY RUSSO and  
JOSEPH ZICARELLI,  
Charged with Civil Contempt of the State Com-  
mission of Investigation.**

---

**BEFORE:**

**FRANK J. KINGFIELD, AJSC  
Mercer County Courthouse  
Trenton, New Jersey**

**September 16, 1969**

**APPEARANCES:**

**ANDREW F. PHELAN, Esq.,  
KENNETH P. ZAUBER, Esq., and  
WILBUR H. MATHESIOUS, Esq.,  
Attorneys for State Commission of  
Investigation.**

*Excerpts of Transcript of Motion*

SAMUEL D. BOZZA, Esq.,  
 Attorney for Robert Occhipinti.  
 WILLIAM POLLACK, ESQ.,  
 Attorney for Anthony Russo.

MICHAEL A. QUERQUES, Esq.,  
 Attorney for Joseph Zicarelli.

(JOSEPH BRILL, Esq., (New York Bar)  
 of Counsel)

EXHIBITS

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>EVIDENCE</u>
WZ-1	Two Pages from Newark Sunday News, 7-27-69	54
WZ-2A	Three Pages of Newark Sunday News, 9-29-69	56
WZ-2B	Two Pages of Sunday Star Ledger, 1-12-69	56
WZ-2C	Pages 1 & 23 of Wall Street Journal, 2-20-69	58
WZ-2D	Pages 1 & 10 of Hudson Dispatch, 3-30-69	59
WZ-3A	Pages 1 & 10 of Evening News, 6-17-69	60
WZ-3B	Pages 1 & 13 of Evening News, 6-19-69	61
WZ-3C	Pages 1 & 14, Star Ledger, 7-10-69	61
WZ-3D	Newark Evening News dated 8-14-69	61
WZ-3E	Pages 1 & 15 of Star Ledger 8-21-69	61

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<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>EVIDENCE</u>
WZ-4	Time Magazine dated 8-22-69	68
WZ-5A	Time Magazine, June 20, 1969	68
WZ-5B	Life Magazine, Sept. 1, 1967	68
WZ-5C	Life Magazine, Sept. 8, 1967	69
WZ-5D	Life Magazine, August 9, 1968	69
WZ-5E	Life Magazine, August 30, 1968	69
WZ-5F	Life Magazine, October 25, 1968	70
WZ-5G	Life Magazine, February 26, 1969	70
WZ-6	Hudson Dispatch Newspapers	71
WZ-7	Newark Evening Newspapers	72
WZ-8	Jersey Journal Newspapers	72
WZ-9	Star Ledger	73
WZ-10	N.Y. Daily News	73
WZ-11	N.Y. Post Newspapers	73
C-1	Stenographic Transcript of Mr. Zicarelli's testimony	77
C-2	Stenographic Transcript of Mr. Russo's testimony	77
C-3	Stenographic Transcript of Mr. Occhipinti's testimony	78
C-4	Letter dated 8-15-69, State Comm. of Investigation by K. P. Zaubers, to V. P. Kauper	80

*Excerpts of Transcript of Motion*

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[Commencing at 10-8]:

The Court: All right, Mr. Querques, you may proceed.

Mr. Querques: I would like to call Mr. Phelan to the stand.

Mr. Mathesius: At this time, we would like to have an offer of proof from Mr. Querques as to how the testimony of Mr. Phelan relates to the issues before the Court.

The Court: Well, I think that is reasonable.

Mr. Querques: If your Honor please, I have already referred to the fact that we, in our brief, indicated we were going to have testimony. By a quick look at page 2, you will see we were going to offer testimony to establish the following:

1. Mr. Zicarelli has been the object of very extensive publicity referring to him not only as a racketeer and a member of the Cosa Nostra, but also as an "internationalist" in crime.

With respect to Number 1, I think Mr. Phelan can [11] testify to it.

We say in number 2 that, Mr. Zicarelli's activities, associations and reputation are well known to the Commission.

And we say in Number 4 that Mr. Zicarelli is by governmental pronouncement a main or prime target for prosecution.

We earlier in Number 3 said he has been a recipient of numerous subpoenas, surveil-



*Excerpts of Transcript of Motion*

lances and investigations over the past ten years by federal and state authorities.

We are satisfied that Mr. Phelan would have this information. And we quickly point out to your Honor that in the Commission's own petition for the Order to Show Cause which was delivered to your Honor, they indicate, "Through its own investigative efforts, the Commission amassed considerable information about Joseph Zicarelli." So, it is for those reasons we offer Mr. Phelan.

Mr. Mathesius: If I understand Mr. Querques correctly, he related to the first four points of his brief, on page 2, as the reason why he wants to have Mr. Phelan testify. Well, if your Honor please, with respect to those four points, we might possibly want to stipulate those in evidence. There is no necessity, and I don't think there is any particular disagreement as to the facts related [12] herein. We don't see how it relates in any event to the hearing and the questions of law facing your Honor, and we do think that primarily those four points are probably well taken.

Mr. Querques: I appreciate the stipulation, and I accept the stipulation, but I do point out to the Court as well as to the Commission that what I have put down in 1 through 4 on page 2 of the brief are just general conclusions, and in order to keep or perfect a good record, I do think that the general statements are not sufficient, but that they should be broadened out by specific information and specific detail. I don't think

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that any Court should rule on the basis of generalities such as are contained on page 2. It is for those reasons that I ask Mr. Phelan to take the chair so that I can prove the generalities through specific questions.

Mr. Mathesius: By the same reason, your Honor, there might be a number of specifics, and that is the particular offer of proof that we are requesting. We are wondering once again how that relates to the issues of law. We face a prior question as to how the questions that were asked of Mr. Zicarelli in the hearing are relevant, and I think we should get to that point first, the pertinency, and then approach these questions, and by that time, this information which Mr. Querques seeks, and which [13] seems to be somewhat of an expedition of sorts to get any or all information that might be relevant to the point in question. Once again, we are going far afield. We are not even starting out at the point where we are going to ask questions and get a lot of testimony that Mr. Querques wants. I think if your Honor looks at those points, generally or specifically they might well be stipulated and they might well be answered by the questions after the pertinency of these questions are developed.

Mr. Querques: Judge, the questions I intend to ask Mr. Phelan are not that large in number. I would estimate they are no more than 25 questions.

Mr. Mathesius: I think it is perfectly

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true, in any event, that his twenty-five questions relate to the four issues, and I think the issues are clear in themselves.

Mr. Querques: I might also add, sir, with respect to the pertinency, I don't know how a Court could intelligently rule unless the specifics that I seek to prove on the record come about by question and answer of Mr. Phelan.

The Court: Well, of course, the only problem we have is, if they stipulate the four points that you have raised in your brief, they are willing to admit all of this, that Mr. Zicarelli has been the object of publicity, and that his activities are known to the Commission, and, [14] of course, that he has been the subject of surveillances and investigations over ten years, and also a target for prosecution. They admit all that. I can't see that we are going to gain anything by the twenty-five questions that you propound. I mean we are probably going to arrive at the same result, aren't we?

Mr. Querques: No, sir. I don't think so, quite honestly, for this reason: let me say again that they have pointed out that they have amassed considerable information, and based upon at least some of the issues which we raise in our brief, I think it becomes incumbent upon your Honor to ultimately determine in this case whether or not due process, fundamental fairness is being applied to these witnesses, if you come to the conclusion, sir, respectfully, that this Commission has asked questions to which

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they already have the answers. Now, you know, sir, from looking at the transcript of the executive session of August 20, 1969, that they asked, as I counted them, and I think I counted them accurately, 100 questions right on the button. Now, if they had the answers to those 100 questions within the "considerable" information that they have amassed through their own so-called investigative efforts, I say to you that this raises a question of the bona fides of the good faith of their calling in this particular individual under these peculiar circumstances [15] and ask him to answer questions to which they already have the answers.

Now, while they may stipulate 1 through 4 on page 2 of my brief, that is not sufficient to demonstrate to you and for the record that they are acting in bad faith, because it doesn't show that they have the particular and specific knowledge that they sought to gain from Mr. Zicarelli.

Now, it may very well be that there is another way to skin the cat, and I would be willing to explore that with your Honor, and that is this, I think that in good conscience, the Commission should be obliged by your Honor to turn over to the Court that so-called mass of information that they have acquired as to Mr. Zicarelli, so that your Honor can determine whether or not they already have the answers. Now, it may be expected that I would ask for that information so that I could then say to your Honor, look at page 2 of this dossier, or on



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page 6 of this report of the F.B.I., they have the answer to question number 10 of Mr. Zicarelli on page 6 of the transcript. But I am not looking for a fishing expedition. I say categorically that I am satisfied to trust them in turning over to you whatever information they have, and I am also satisfied to trust your Honor to go over the information that they give you so that if you want to look to see whether or not [16] they have the answers to these 100 questions, you may do so. Although I do think at this posture of the case, I should be entitled to demonstrate and demonstrate forcibly that they have some, if not all, of the answers to what I consider the loaded questions.

I don't know if I am getting myself over to your Honor, but of the 100 questions, some of them are loaded. They are potent. They are so-called dynamite questions, in my mind, and those are the ones that I am concerned with. I am concerned with eliciting the specifics from Mr. Phelan or from any other member of the Commission, for that matter, so as to demonstrate again the bona fides and the good faith, because I fail to see, and they have failed to point out any case that would permit them to go on, not a fishing expedition, because it is not a fishing expedition if you have got the answers already. It is something worse than a fishing expedition. It is a sign of bad faith on their part to ask this man a question to which they already have the answer, if their object ultimately is to incarcerate him by way of.

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civil or criminal contempt. I don't see how, by our talking, we can really explore this area. This area requires us to take testimony, then, after the testimony, it requires, respectfully, your Honor to go into this information that they have, which they seek, of course, to keep private and [17] to keep secret. And I will go along with that. I have no objection to that, although I think, frankly, under these proceedings we really should see it, but at the moment, I don't say that, and I don't think I ever will say that because I know I can trust your Honor to read it, to peruse it and study it and come to the same conclusion that I have, and that is that they already have the answers.

Mr. Mathesius: Mr. Querques raises a very novel and interesting point, however, that point is completely without merit. That point is that the State Commission of Investigation does not conduct a bona fide investigation because it already knows the answers to some or all of its questions. If that be the indictment against the State Commission of Investigation, then that indictment must fall.

What law, what can Mr. Querques reach to say that only because the State Commission of Investigation already knows the answers to certain questions, that therefore it makes it a licentious and questionable investigation, and they already know the answers, Mr. Querques can say, "Well, Mr. Zicarelli, they already know the answers, so just repeat them." What difference does it make?

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That is not really the point. The point is that to take, for example, one of the questions, "Mr. Zicarelli, [18] are you a member of the Cosa Nostra?" Well, can Mr. Zicarelli answer yes or no to that? What about the evidence that we have with respect to whether he is or not? Who can tell us best? Can we determine that from hearsay or from the object of testimony or from the testimony of the individual himself? He is being protected absolutely by his answer. He was given testimonial immunity, and it cannot come back to him in any way, shape or form.

Now, if we take as a proposition that the Commission knows every one of the answers, I say to your Honor that has no relation. If the Commission seeks corroboration, that is legitimate and a worthwhile proposition for this Commission to make, corroborating information and to determine for itself exactly what the ramifications of organized crime, what we call the Cosa Nostra or the Mafia or any other political racketeering ramifications that might be developed from this.

The questions themselves, they speak for themselves. Now, the answers to those questions, I say the point is missed entirely whether we know the answer by inference or innuendo from other sources of information is immaterial. For that reason, I say we should not have a hearing at this point. Take the proposition that we do know all the answers, it doesn't affect the bona fides of the investigation one iota.

[19] The Court: The problem we have,



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I think, Mr. Querques is challenging the bona fides of the investigation. I am somewhat inclined to agree — of course, I don't know what questions he intends to ask. I was thinking that possibly we ought to find out just what they are. I am inclined to feel, too, that I don't think that the Commission should be forced to reveal its source of information either.

Mr. Querques: Your Honor perhaps misunderstood me. I do not intend by my questions to ask anyone the source of the information. My only purpose in asking the questions is to determine whether or not they do have the information. Whether it came from a tape, whether it came from an informer, whether it came from the F.B.I., I care not. What I care about is, do they have the information?

Now, I take Mr. Mathesius' statements to indicate — I trust I am correct. If not, correct me. I gather from what he says that they acknowledge that they do have the answers to these approximately 100 questions that were asked on August 20, 1969.

Mr. Mathesius: No, not all of them, your Honor. Maybe I can clear it up. I am saying, taking it as a fundamental proposition that we do have the answers, if we do, it is absolutely immaterial. If Mr. Querques' point is to put Mr. Phelan on the stand and by Mr. Phelan's [20] testimony say they already have the information, that is irrelevant and immaterial, your Honor.



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It means nothing with respect to the pertinency and to the legitimate objectives of this investigation. I was stating that as a hypothetical, if we in fact did, which I am not admitting.

The Court: Well, let's get the questions? Certainly, since you are going to ask them, there is no reason why they shouldn't be — Of course, I realize that possibly one question might lead to another, but if I had some idea just what you want.

Mr. Querques: I can do that for your Honor. I would like to ask Mr. Phelan, for example, whether or not he has information that Mr. Zicarelli is a member of a so-called Cosa Nostra family that carries the label the Bonanno family.

The Court: Let's stop there. Of course, we have the press. We have magazines. I don't know whether they have any conclusive proof — That is, when I talk about proof, that which could be used in a court of law or whether it would be proof in the nature of hearsay that people have written about people. After all, all of these men have, I suppose, a reputation through the press, and every time they appear in court or every time they do something, even if they were, I suppose, to do nothing more than go through a red light, there would probably be some reference to [21] their past. I don't know. I have seen it in certain instances. I haven't seen it particularly with any of these people, but I know that it has happened to people in this area, people

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who have, let me say, somewhat similar reputations in the community, that every time they do something, the press blows it up to all proportions. And, of course, there is nothing we can do to stop it, I suppose.

Mr. Querques: Your Honor is exactly right about what you have said. But your Honor has omitted this. I am not concerned about what Mr. Zicarelli's reputation is, as created by the press. What I am concerned about is the information that the Commission has which does not come from the press, but rather comes from official sources, and I will be specific. This Commission, for all practical purposes, is a branch of the Attorney General's office. If we cannot accept that proposition, it is, at least, an agency of the State Government of New Jersey, and therefore can call upon the Attorney General's office for its information. So that I think we can establish that they have information from an official source, to wit, the Attorney General. They have information from their own sources, to wit, their own investigators. They have information coming to them from the F.B.I., another official source. This can go on and on. I am not trying to create a situation here where I say they have facts which they [22] got out of a newspaper, although that is also true. They also have facts which they got out of magazines. But it is the official source of information coming in to them by which they have knowledge of the man's background, the man's activities, the man's friends and

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associates, and the man's alleged illegal actions, and it is this situation which creates the lack of bona fides on their part. This situation creates the bad faith in calling him in in an investigation of this kind.

Now, I must confess that it is a little difficult to talk about these things because we are no talking about specifics. The brief is broken down into six points. Some of the points have sub-points. And, frankly, the whole thing is not going to make sense either before this Court or before any other Court that may take an Appellate view of the matter unless there is a clear record. Our conversing back and forth with your Honor and between ourselves about these issues is not going to help anyone who has the obligation, such as your Honor, to make a decision, nor is it going to help anyone who might have to review your Honor's decision. I think we have to get to the hard core facts of the situation, otherwise we are going to be frustrated in proving what we say we should be able to prove in order that the legal consequences which we suggest in the brief will flow. For me to get up [23] and just spout off about these things is meaningless. If I can put them on the record and establish them —

The Court: Well, go ahead with your questions anyway. You have given one. Give us another.

Mr. Querques: I wanted to ask Mr. Phelan if he had information that the Cosa Nostra or the Mafia is a term used by law

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enforcement people such as themselves to indicate a family whose purpose is dedicated to crime, and whose purpose is dedicated to the protection of those members of the family engaged in that activity? I wanted to ask him if he had information that for one to become a Cosa Nostra member, so-called, he must be initiated into a particular family. I wanted to ask him if it isn't a fact or if he doesn't have information to the effect that in order to be initiated or as part of the initiation process you must take an oath. Then I wanted to ask him about the nature of the oath. Isn't it true that the nature of the oath is one of silence? That is to say, if you speak about the activities of the family or your own activities, the family must commit or sentence you to death by way of murder? I wanted to ask him if he didn't have information with respect to at least one so-called underworld informer who alleges that he was a member of this Cosa Nostra, and that is this fellow Joseph Valachi who testified in 1963 in Washington before the McClellan [24] Committee; if it wasn't true that in that situation the so-called family of which he was a member put a price on his head of \$100,000.00 to have him killed because he violated that oath? I wanted to ask him if it isn't true that the government, when they get informers who inform against the underworld, and especially organized crime, the government will provide a new job for the man, they will relocate him, they will change his family and iden-



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tity, and, if necessary, even give him money to get started? I wanted to ask him if he doesn't have knowledge that Mr. Zicarelli has been precisely and specifically labeled by the United States Government, to wit, the defendant of justice, as one of eight main targets for prosecution by the Federal Government. This was done in January of 1969. The information was given by the Department of Justice to all kind of newspapers and news media, and they know it. I wanted to ask him if it wasn't true that he had information that this "internationalist" that was given to Mr. Zicarelli was given to him because of alleged activities with the Dominican Republic, Venezuela and Canada and other places.

Now, I may digress here for a moment. The answer to that question is very crucial in that this area, because one of the points that we raise is that a man in the United States, irrespective of an offer of [25] immunity, has a right to invoke the Fifth Amendment if he has a real and appreciable danger of prosecution in, first of all, a foreign country, and, secondly, in a sister state. Now, for me to say it is one thing, for them to acknowledge they have this information and then have me argue from the admission is completely another matter.

I do think it is an extremely substantial point. As a matter of fact, let me say now that the brief omits to give you the benefit of the Murphy vs. Waterfront Commission and the dissertation by Mr. Justice Goldberg in

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the case of United States of America against McCrae, which I will argue, although it isn't in the brief.

I want to ask Mr. Phelan if he has information that Mr. Zicarelli is sought in the State of New York by three different counties, specifically Kings County in connection with the Grand Jury investigation concerning again this so-called Bonanno family and warring factions; Queens County with respect to the murder of one by the name of Joseph Giuliani; and also in Bronx County with respect to certain numbers operations and bribery of public officials in Bronx County on which the allegation is based that this activity has its genesis in the State of New Jersey, and Mr. Zicarelli has something to do with it. Here again the admission would assist us in arguing forcefully that the immunity sought to be conferred in New [26] Jersey is meaningless because it does not protect from prosecution in New York.

I also wanted to ask him if he didn't have knowledge that Mr. Zicarelli has received many subpoenas and subjected to investigation by State and Federal men as well as surveillances by both State and Federal men over at least the past 5 to 6 years. I wanted to ask him if it is true that some or all of this information some or all of it comes from either wiretapping, bugging, eavesdropping or other electronic apparatus.

I wanted to ask him whether of the 100 questions of Mr. Zicarelli, if they could

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answer all of the questions with the information already available. . I wanted to ask him if it wasn't true that the Attorney General, former Attorney General, Robert Kennedy, and a member of this Commission, Charles L. Bertini, Esq., haven't both taken the position publicly and to the press that Cosa Nostra is to them a private government dedicated to living off people in some parasitic nature.

I wanted to ask him if it wasn't a fact that in this case presently before you, the petition and the Order to Show Cause were prepared the day before the hearing to show that they knew as of the 19th that Mr. Zicarelli was going to invoke the Fifth Amendment, in order to demonstrate the good faith or bad faith on their part, because I [27] think it is important that if on the 19th they prepared this petition and had Commissioner Hyland sign it either on the 19th or on the following morning of the 20th, and if I took place even before Mr. Zicarelli and I went in before the Commission, and if it was signed before the questions were even put to us, it indicates very clearly to me, at least, that in their minds they knew exactly what Mr. Zicarelli was going to do. If they know it, how did they know it? They know it from everything that I have been saying without repeating it. And because they knew it, it raises the question that I raise in the brief, what are they really trying to do here? Are they really, genuinely, sincerely, and earnestly attempting to get facts so that they can

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recommend legislation?

I want to ultimately recommend to your Honor that is nothing but hogwash because, first of all, the statute doesn't say that. The statute says that they are relegated to making recommendations or giving facts to the Governor who in turn makes recommendations to the Legislature. I think that this question bears on the other issues. It bears on the issue of separation of powers.

So, I think without going any further, and without, you know, sort of — I get the impression that your Honor is getting tired of hearing me, and I don't want to tire you out, but I do want to, as a lawyer, professionally [28] explain for the record the necessity of getting this information so that the arguments ultimately made with respect to the law are properly focused.

The Court: Well, Mr. Mathesius?

Mr. Mathesius: I will just make a very short statement.

Mr. Querques has raised six points in his brief, and the recitation that he just made relates to none of those legal issues. He has formally stated that he wants Mr. Phelan to get on the stand and he would not ask the source, whether that source be the Life Magazine or whether it be bugging, wiretapping, official sources. He would not ask the source, but he would ask, did he have information? How, what possible point, what point would an answer of yes or no get? I see nothing.

He further related that his questioning was to show the bona fides of the investigation.



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And I say to your Honor that the second and third points were perceived from Mr. Querques' recitation, not for the bona fides but more to show questions of incrimination, whether he is being prosecuted elsewhere. All of this is meaningless to the point at hand. To those six issues that Mr. Querques raised, those questions don't mean a thing.

Your Honor, quite respectfully —

Mr. Querques: May I get us back in perspective, [29] Judge? All the answers or most of the answers to the questions that I have indicated to your Honor I would like to get answers to, in my humble judgment are incorporated in essence, in spirit and in actuality in Point 4 of the brief, which point says that even if we come to the conclusion that the statute is constitutional, you may nonetheless come to the conclusion that the implementation or the use of the statute by the Commission is unconstitutional. To phrase it another way, while they may have the right to investigate, they do not have a right to abuse the investigative process. Having the right to investigate doesn't give you the right to abuse that process. And I am not just talking off the top of my head, because in the brief, we cite to you the case of Watkins, Sweezy and Scull which stand for that proposition.

Mr. Bozza: Might I just add, if your Honor please, that I think this Court is saddled with the responsibility of evaluating and considering the setting and the circum-

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stances under which these questions have been propounded, because that has been held to be criteria, to take it into consideration when evaluating and disposing of these complexed issues that are before you in this hearing. So that any testimony that would give your Honor the benefit of the circumstances and the setting under which these questions were propounded is very, very important.

[30] Mr. Querques: May I say, sir, I trust that you understand and appreciate the sincerity with which we make these arguments, not only from the legal standpoint but also from a practical standpoint. I think that it should be obvious to you that we are not looking to go through what they have. Bear in mind that I said I would be satisfied for your Honor to look through that information, and bear in mind also that we have asked that the public be excluded here. We are not looking for glory. We are not looking to impede anybody. We are not looking to step on anybody's toes. But we do insist and we do hope that everything that may shed light on the issues raised will be considered by your Honor, because I think you would agree with me, with all your years of experience, that it is unfair to a litigant to have an issue decided on half-facts or three-quarter facts or omitted facts. We are just trying to bring everything that we can think of which is relevant here before you, and if you want to take some of it in camera, it is perfectly all right with us.

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Mr. Mahhesius: One final question. Relevancy is the point to this motion of Mr. Querques to have testimony taken. Your Honor, the State Commission of Investigation has information from multifarious sources. It has information from Life Magazine, the papers, the investigators, some official sources. What we haven't had, [31] if your Honor please, we haven't had information from the witnesses. That is all we ask your Honor, to get the information from the horse's mouth.

Mr. Querques: That is the essence of this whole proceeding. That is the essence of it. And that is if you have the information, can you go to the horse's mouth and attempt to extract that information from the so-called horse's mouth, if by so doing you accomplish two things. You accomplish, first of all, a dissolution or a dissolving or a destruction of his constitutional rights. And, on the other hand, unrelated to the law, but really the body of the law, you destroy the human being. And that is what we are talking about.

So, when they say want to go to the horse's mouth, it is just nothing but a lot of lip service talking out of two sides of your mouth. If I know an answer, I don't go bother somebody to get the answer all over again. If I know an answer, I don't get an answer from somebody and want to rip up the Constitution in his face. If I have got an answer, I don't want to go to the man and say you give me the answer because you

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are the horse's mouth, and in the process of getting the answer, Mister, I am going to see to it one of two things happen, you will either get killed by your own or I will put you in jail with the help [32] of the Judge who is nothing but a donkey sitting up there because I run it. I run it. When I ask you a question and you refuse to answer, that Judge has no discretion the way they see it. They bring the man in front of the Judge and they say, "We asked him six questions. He refused to answer. We gave him the immunity, and now sack him away." That is the whole thing we are here to decide. That is the whole thing.

Mr. Mathesius: Your Honor, despite the emotional effluvium we just experienced in this court, the fact that Mr. Zicarelli — And I say at this point, your Honor, that Mr. Querques has again jumped a little ahead and said we do have the information. I do not acknowledge that as a fact. I am saying hypothetically again and I will say it again to Mr. Querques hypothetically, if we had it, it wouldn't make any difference. But we are entitled to get the information from Mr. Zicarelli, and that is the whole point:

Mr. Querques: Very quickly, your Honor. I have heard in one instance where they say we will concede we have the information, then they say on the other hand we don't acknowledge that we have the information. And I respectfully submit for the last time that that particular matter may be resolved



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as to whether they have it or not by your Honor seeing their file to peruse in camera.

[33] Mr. Mathesius: May I make a final point about concession. We at no time ever conceded that we have the information. If there is any question about that, I would like that resolved. I once again want to restate that hypothetically if we should have it, it doesn't make any difference. And I think Mr. Querques has already agreed that the source doesn't make any difference. He is not going to question the sources, whether it is Life Magazine or what. The point is, we are entitled to get that information from Mr. Zicarelli.

\* \* \*

[Commencing at 37-2]:

The Court: Well, of course, the only problem I have is this, the questions that you wish to propound of the Commission in a sense, I suppose, puts the Commission on trial primarily as to its good faith, and I will admit that in the course of reading the extensive briefs and documents in this case, there are a great many unsolved problems that I haven't resolved in my mind either. But I don't think that putting Mr. Phelan on the stand will help me better to decide the case. I think I have to accept that from what has been said today that the Commission acknowledges that it has some information. Now, whether it has all the information or

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not, I question, from the remarks that were made by Mr. Mathesius, that they probably have some information. And I appreciate the dilemma that it creates for the witnesses, but we do have, I suppose — And I am assuming that the answers to those questions will probably lead us again to the four points that you have set forth, that they have some information. Now anybody can prove that a particular person is a member of an organization such as the Cosa Nostra or the Mafia, and prove it beyond a reasonable doubt, I don't know, unless somebody in the organization has seen fit to be an informer, and has mentioned names. And I have read the paper. This is my first bout with criminal laws in twelve years. I don't [38] follow it too much. I honestly don't think that I need the answers to those questions to decide the overlying issues, the problem of the constitutionality of the Commission, even, let's say, the good faith of the Commission. I have to accept for the time being that the Commission is seeking information for legitimate purposes. I think there are enough constitutional issues raised in this case to concern me without going into this collateral trial of putting the Commission on trial, and that is what that amounts to.

Mr. Querques: Well, it may appear this way, sir, on the surface that we are attempting to put them on trial, but it really isn't that at all. What we are trying to expose here is that the processes that they used are

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abusive of the Constitution in that they go too far afield with respect to a person of the type and nature of Mr. Zicarelli. Now, I think that if your Honor says you have to accept their good faith, it throws me for a loss, because I think that when we make the allegation that they are dealing in bad faith, because they have the answers and so forth and so on, I think that we are entitled to at least have the opportunity to attempt to demonstrate that rather than to be confronted with a situation where their good faith, ipso facto, is accepted. So, it is for that reason that in the final analysis I said to you, would you at least take the information that they have and peruse it on your own in [39] camera, because if you do it that way, at least we get something, whereas this other way, if you don't take it, we get absolutely nothing.

\* \* \*

[Commencing at 49-8]:

The Court: . . . Well, frankly, I have to accept the good faith of the Commission. We do have a law that was passed creating the Commission. I certainly think that one of the objectives certainly of good government, I suppose, is to ascertain whether such a thing as organized crime exists or even flourishes within a state, and to take measures to counteract it. Now, whether the source of information that the Commission

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has, that it has all of the answers or part of the answers, I don't think is material. I am somewhat inclined to feel that the Commission still have the right to seek information from whatever source it can derive information.

Now, I will admit that one point that probably does trouble me, and that is the issue of whether the sole information that it has concerning these witnesses might have been obtained by the Commission through sources that might be deemed improper. That has given me some concern. But even assuming for a moment that [50] the only source it has is from illegal wiretaps, I am still not convinced that the Commission should be precluded from its investigation to discover the situation of conditions that might exist in this State. Now, whether it does or not, I don't know. I don't know whether the Commission knows. But certainly it has the right to find out whether it does. And I suppose that when I reach that conclusion, that then we have the question of whether or not these questions either are relevant or are material to that matter. But my ruling at the present time is such that I am not going to have Mr. Phelan take the stand and answer the questions about to be propounded of him by Mr. Querques.

Mr. Querques: If your Honor please, with respect to this ruling, and just so that the record is perfectly clear, may I indicate by way of an offer of proof that with respect to those questions that I indicate I would ask



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Mr. Phelan, I now indicate for the record that I would expect that he would have given me affirmative answers, that his "yes" answers to all of the questions that I would have asked him about whether or not he had information about the various subject matters that I include in the questions.

The Court: Well, you made your point. I don't know whether he would have given you affirmative answers [51] or not. The only point I feel what was said quite a while ago when we started, that it is apparent that the Commission has sufficient answers to warrant a conclusion as you have set forth in your four points on page 2 of your brief, that certainly the answers would reach that conclusion. I suppose to that extent it probably means that the answers to the questions would be affirmative.

\* \* \*

[Commencing at 55-5]:

The Court: What is the purpose of putting these articles in?

Mr. Querques: Yes, your Honor, I have several purposes. The newspapers and magazines will demonstrate firstly that Mr. Zicarelli is a target for prosecution in New York, in New Jersey, at the Federal level, and even in foreign countries, and I propose to show that by these — I have broken them down into categories — by the next four newspapers that I am going to give you, if we can have

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them marked with WZ-2A, B, C and D, that is the purpose of demonstrating the scope of his sphere of involvement.

Mr. Mathesius: Again these matters have all been stipulated to, and notwithstanding the hearsay problem that the articles bring into the picture, as Mr. Phelan said, we have already stipulated these facts. If Mr. Querques desires them put in the record, we have no objection.

The Court: All right, let them be marked.

Mr. Querques: For the record, the Sunday News dated September 29th, 1969, from the New Jersey section [56] in which the heading is, "The Mafia Spreads Out," pages 1, 12 and 13, Mr. Zicarelli being mentioned specifically on page 13, to be marked as WZ-2A.

(Three pages of the Newark Sunday News dated September 29, 1969 above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-2A.)

Mr. Querques: As WZ-2B, the Sunday Star Ledger of January 12, 1969, pages 1 and 24, wherein the lead line reads "U.S. Names Targets in Mafia Probe." The lead line is repeated on page 24. And on page 24 appears a picture of Mr. Zicarelli with several other individuals.

(Two pages of the Sunday Star Ledger dated January 12, 1969 above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-2B).

Mr. Mathesius: If your Honor please, at this time, I would like to move that this be entered into evidence in bulk, if he is going

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through the various issues. There are broad questions of hearsay and what have you. I wonder if your Honor would consider papers as evidence of the statement Mr. Querques made which has already been stipulated to, so we might not waste any more time.

Mr. Querques: It is not a waste of time. The record wouldn't be clear as to what the papers are. Supposing they were lost? If you want to refer to [57] something, you can't refer to something in bulk.

Mr. Mathesius: It appears that Mr. Querques has well over fifty issues.

Mr. Querques: I am sorry. Maybe I misunderstood. There are three categories which I want to spell out, the rest I want to offer in bulk.

Mr. Mathesius: I would still make the same request, Your Honor, that the entire matters be introduced in bulk. I don't see how they are relevant, but we have condescended to allowing them to be admitted in evidence over objection. But it is apparent it will get out of hand.

The Court: Well, I don't think it will get out of hand. It is stipulated in evidence. I will let Mr. Querques proceed. He is trying his case. Let him try it.

Mr. Mathesius: Your Honor, at this point, may I request that this proceeding be moved from an in camera proceeding to an open door proceeding? I think we are by the portions of the testimonial offerings.

Mr. Querques: No, sir, that isn't so. We haven't even come to the pertinency of

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the questions, which is the main part of the reason for this being held in private, because the questions have never been aired in public.

Mr. Mathesius: It was my understanding that these questions were submitted as a part of our brief and [58] to the Court, and Mr. Querques, you have a copy, do you not?

Mr. Querques: A copy of the transcript, but nobody has ever argued the pertinency of them yet. Nobody has reflected on them yet. We all know what they are, but there has been no discussion of them.

Mr. Phelan: Your Honor, may we then argue the question of pertinency of the questions before we get to all the other issues that are before the Court? It was my understanding that the Court was clear that that would be the first issue that was to be considered.

The Court: Well, I feel that in view of the ruling that I previously made precluding Mr. Querques or his associates from inquiring of you, Mr. Phelan, that he is now seeking to, I suppose, put something on the record to indicate that you are aware of this situation, for what it is worth.

Mr. Phelan: I see.

The Court: I think he is entitled to put that on the record.

Mr. Querques: As WZ-2C, the Wall Street Journal dated Thursday, February 20, 1969, pages 1 and 23.



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(Pages 1 and 23 of the Wall Street Journal dated February 20, 1969, above referred to by Mr. [59] Querques, were received in evidence and marked Exhibit WZ-2C.)

Mr. Querques: As WZ-2D, the Hudson Dispatch of Saturday, August 30, 1969, pages 1 and 10.

(Pages 1 and 10 of the Hudson Dispatch dated August 30, 1969 above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-2d.)

The Court: Before you go on to the next batch, what are you attempting to show by WZ-2?

Mr. Querques: WZ-2 -

The Court: In capsule form.

Mr. Querques: It reflects on the fact that Mr. Zicarelli is a target of prosecution in New York, New Jersey, Federal jurisdictions and foreign countries.

The Court: All right.

Mr. Querques: Now, with respect to the second batch, they will reflect upon statements made by Mr. Phelan and by the Government to the press with respect to the desires of the State to jail the witnesses that were subpoenaed in connection with this particular hearing, of which Mr. Zicarelli is only one, sir.

The Court: I just didn't get the import of that. Will you repeat that, Don?

(Reporter read the record as requested.)

Mr. Mathesius: That is a little broad to digest [60] and swallow in a capsulated ver-

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sion. May we have these introduced without any capsulation? They are already hearsay, and if they stand in support of the points Mr. Querques makes on page 2, we have already stipulated them. Again, your Honor can take judicial notice of them, but to have Mr. Querques make statements that they are evidence of the fact that Mr. Phelan and the Governor were desirous to jail Mr. Zicarelli —

The Court: The only reason I am asking Mr. Querques to capsulize it is to save me the time of reading them in detail.

Mr. Querques: That is why I have broken them down, sir. If you do want to read a particular item, you will know exactly where to go.

The Court: After all, I am aware they are newspaper articles. Just what import they are going to have, I don't know.

Go ahead.

Mr. Querques: As WZ-3A, the Evening News of Tuesday, June 17, 1969, referring to pages 1 and 10.

(Pages 1 and 10 of the Evening News dated June 17, 1969, above referred to by Mr. Querques was received in evidence and marked Exhibit WZ-3A.)

Mr. Querques: As WZ-3B, sir, the Evening News dated Wednesday, June 19, 1969, wherein I specifically [61] call to your attention the headline, "Immunity to be Lever" on page 1 carried over to page 13.

(Pages 1 and 13 of the Evening News

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dated June 19, 1969, above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-3B.)

Mr. Querques: As WZ-3C, the Star Ledger of Thursday, July 10, 1969, wherein the heading on page 1 reads, "DeCavalcante Grilled Ordered Back for More," and also on page 14.

(Pages 1 and 14 of the Star Ledger dated July 10, 1969 above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-3C.)

Mr. Querques: As WZ-3D, the Evening News of Thursday, August 14, 1969, wherein the headline is, "Bertini Asks Bar to Form Crime Units."

(Newark Evening News dated August 14, 1969 above referred to by Mr. Querques was received in evidence and marked Exhibit WZ-3D.)

Mr. Querques: As WZ-3E, the Star Ledger dated Thursday, August 21, 1969, wherein the headline reads, "SCI Chairman Confident of Jail Terms for Silent 3," and going over to page 15.

(Pages 1 and 15 of the Star Ledger dated August 21, 1969 above referred to by Mr. Querques, were received in evidence and marked Exhibit WZ-3E.)

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[Commencing at 67-22]:

Mr. Querques: May I offer, sir, as WZ-4, Time Magazine of August 22, 1969. That bears the heading on the cover, "Mafia versus America," and the article contained in the magazine beginning at page 17 and running over to page 27. I offer this article to demonstrate the [68] definition of the so-called Cosa Nostra, the necessity to be initiated into it, and what the initiation process consists of, and what the code of silence consists of, and what the consequences of violating that code are.

The Court: It may be marked WZ-4. (Time Magazine dated August 22, 1969, above referred to by Mr. Querques, was received in evidence and marked Exhibit WZ-4.)

Mr. Querques: I have, sir, seven magazines. May I offer these as one exhibit, again making them A, B, C, et cetera. As WZ-5A, Time Magazine dated June 20, 1969, the article which appears beginning at page 22.

(Time Magazine dated June 20, 1969 above referred to by Mr. Querques was received in evidence and marked Exhibit WZ-5A.)

Mr. Querques: Then I have six Life Magazines. May I have the one dated September 1, 1967, marked as WZ-5B, and includes therein the article beginning on page 15.

(Life Magazine dated September 1, 1967



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above referred to by Mr. Querques, was received in evidence and marked Exhibit WZ-5B.)

Mr. Querques: May I offer as WZ-5C, Life Magazine article dated September 8, 1967. I call to your attention the article entitled "The Mob" beginning at [69] page 91. I specifically point out in that article references to Mr. Zicarelli appearing on page 100 and 101.

(Life Magazine dated September 8, 1967 above referred to by Mr. Querques, was received in evidence and marked Exhibit WZ-5C.)

Mr. Querques: May I have Life Magazine dated August 9, 1968, marked as Exhibit WZ-5D with respect to the article entitled, "The Congressman and Hoodlum," beginning at page 20. And I point out to your Honor the picture of Mr. Zicarelli appearing on page 21, and the entire article including his name in various spots.

Mr. Phelan: What was the date of that?

Mr. Querques: August 9, 1968.

(Life Magazine dated August 9, 1968 above referred to by Mr. Querques was received in evidence and marked Exhibit WZ-5D.)

Mr. Querques: May I offer, sir, as WZ-5E Life Magazine article dated August 30, 1968, beginning on page 30, the title being "The Mob."

Mr. Phelan: Might I ask Mr. Querques what relevancy that has to Mr. Zicarelli?

Mr. Querques: His name is not mentioned in that, but it does refer to the subject

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matter of the Cosa Nostra.

(Life Magazine dated August 30, 1969 above referred to by Mr. Querques was received in evidence and [70] marked Exhibit WZ-5E.)

Mr. Querques: May I offer Life Magazine dated October 25, 1968 as WZ-5F, specifically the article beginning on page 70 entitled, "The Mob: Gallagher Continued: The Congressman and the Salad Oil Swindler."

(Life Magazine dated October 25, 1968 above referred to by Mr. Querques was received in evidence and marked Exhibit WZ-5F.)

Mr. Querques: May I have marked as WZ-5G Life Magazine article dated February 28, 1969, the article appearing beginning on page 21 entitled "Power Struggle After Death in Family."

(Life Magazine dated February 28, 1969 above referred to by Mr. Querques was received in evidence and marked Exhibit WZ-5G.)

Mr. Querques: May I offer, sir, as WZ-6 various editions of newspapers known as the Hudson Dispatch, and specifically offering them all as one exhibit rather than give them each a separate letter? Those issues of September 7, 1968, September 19, 1968, September 20, 1968, December 28, 1968, December 30, 1968, December 31, 1968, January 3, 1969, January 13, 1969, February 12, 1969, February 13, 1969, July 10, 1969, July 11, 1969, July 16, 1969, July 23, 1969, July 25, 1969, July 30, 1969, August 20,

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1969, August 21, 1969, August 22, 1969, September 6, 1969.

[71] Mr. Phelan: Your Honor, with regard to that last offer, I would like to say that I have a copy — I am not terribly familiar with the Hudson Dispatch. I have a copy of it in front of me dated August 25, 1969, in which a statement is purported to be made by myself which I feel is clearly erroneous as to any position I ever stated concerning the petitions before the Court or the Commission's petitions before the Court. I don't know with regard to the other articles which have been just presented. I will not seek to examine them at this time, but if those are as accurately reported as the one I have in my hand, I have some doubts as to the accuracy of them.

(Hudson Dispatch newspapers above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-6.)

Mr. Querques: May I offer in bulk, sir, as WZ-7, the Newark Evening newspaper, and as part of that exhibit in bulk those articles appearing on the following dates, December 26, 1968, January 22, 1969, June 10, 1969, June 11, 1969, June 12, 1969, June 15, 1969, June 19, 1969, June 24, 1969, July 6, 1969, July 8, 1969, July 9, 1969. There are several pages in July 9, your Honor, which are not joined together. Another one dated July 9, a different issue of the same newspaper, being the Sports Final. July [72] 10, 1969, July 11, 1969, July 14, 1969.

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July 15, 1969, again July 15, 1969, the Sports Final Edition, July 16, 1969, July 22, 69, July 23, July 29, July 30, July 31, August 2, August 20, August 20 again, the Sports Final, and August 21, 1969. V

(Jersey Journal newspapers above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-8.)

Mr. Querques: I now offer, your Honor, as WZ-9, a newspaper known as the Star Ledger, published in Newark, New Jersey. Again offered in bulk those issues beginning with August 12, 1969, and including July 30, 1969, July 23, 1969, July 8, 1969 — I am sorry, sir, some of these are out of order. The dates will not be in order. December 27, '68, December 30, '68, November 29, '68, August 21, '69, August 7, '69, August 8, '69, August 2, '69, August 20, '69, July 30, '69, July 23, '69, July 21, '69, July 17, '69, July 16, '69, July 15, '69, July 14, '69, July 13, '69, [73] July 11, '69, July 10, '69, July 9, June 11, December 31, '68, January 12, '69, September 20, '68.

(Star Ledger newspapers above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-9.)

Mr. Querques: Offered in bulk, sir, as WZ-10, articles from the New York Daily News, specifically January 23, 1969, January 24, 1969, February 12, 1969, June 24, 1969, July 9, 1969, and August 21, 1969.

(New York Daily News newspapers above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-10.)



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Mr. Querques: Offered in bulk, your Honor, as WZ-11, the New York Post newspaper stories appearing in the issues of February 11, 1969, February 12, '69, June 11, '69, and July 9, '69.

(New York Post newspapers above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-11.)

The Court: All right.

Mr. Querques: If your Honor please, I would like, in view of the progress we have been making, and in view of the procedure we have been following, I would like to make an additional offer of proof. I did intend to call two New Jersey State Troopers, one by the last name of [74] Trainor, that is Joseph Trainor, and one whose last name is Baum. I recite to the Court that I sincerely believe that if these two men were called and were to testify under oath, I would be able to establish from them that on the date of January 11, 1968, as a result of an arrangement made by me with one of these two men or with their Superior, I don't recall which it was, but in any event, as a result of an arrangement made by me, they appeared in my office to meet with Mr. Zicarelli, and as a result of meeting with Mr. Zicarelli, they put five questions, approximately, to him. Those questions related to an alleged bribery of the one superintendent of the State Police, Superintendent Capello, whether or not there was any activity with respect to a Major Haley of the New Jersey State Police. This investigation, as I un-

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derstand it, emanated as a result of one of the articles that appeared in one of the Life Magazines which your Honor now has before you, and I believe it is that particular Life Magazine article on September 8th, 1967. They would tell you that at that time Mr. Zicarelli invoked all his constitutional rights and refused to answer any of the questions on the advice of his attorney, to wit, myself. If these Troopers were to testify, they would also acknowledge and admit that they served on Mr. Zicarelli and his home in Cliffside Park, on the date of May 28, 1968, a subpoena directing Mr. Zicarelli to appear [75] as a witness in a Grand Jury investigation concerning homicides in Kings County, New York.

Mr. Phelan: The State Commission will stipulate to those facts, sir.

Mr. Querques: If your Honor pleases, with respect to my case on behalf of Mr. Zicarelli, I believe at this time I have submitted to you either by way of documentation, that is in the form of exhibits, or I have submitted to you by way of offers of proof everything that I intended to put before your Honor. The only thing I would like to renew is that application to come from your Honor directing the Commission to turn over to you the files that they have with respect to Mr. Zicarelli. So that everything else that we have put in evidence may cast its proper light on the total picture.

The Court: Well, I have already ruled on that.

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Mr. Querques: I just wanted to renew it.

The Court: I am not in the habit of changing my mind in such a short time.

Mr. Querques: It may be that after your Honor reviews this material, you might get curious.

The Court: It happens sometime, I will agree. I have been known to change my mind.

Mr. Querques: At this point, since all the testimony is in from us, I don't know if any of the [76] others want to present testimony, but, if not, I would think that we would now go to the area of the pertinency of the questions actually asked on August 20, 1969.

Mr. Phelan: In that connection, I wonder if you might mark as exhibits the transcript of the testimony which is certified by the Court Reporter.

The Court: Any objection?

Mr. Phelan: I also mentioned that the testimony of Mr. Occhipinti is before the Court in Judge Salvatore's matter.

Mr. Bozza: I would have no objection to your Honor having another one.

Mr. Querques: If your Honor please, I have no objection to the transcript being marked. However, I do have this request, and that is it be marked in such a way as to be impounded and constitute in effect a court exhibit so that it is not readily digestible by the public.

The Court: Well, since we are trying to keep the questions secret, I agree that I

*Excerpts of Transcript of Motion*

think that is so. Now, what about all of this?

Mr. Querques: I have the same feeling. I am not one to be a hypocrite. If that ruling is good for the Commission, that ruling is good for me. I don't intend for any of the material which I gave you to be disseminated either by or for either side. It is for your perusal and [77] your guidance, not the public.

The Court: Any objection to that?

Mr. Bozza: No.

Mr. Phelan: We have no objection.

The Court: All right.

I think we will mark this C-1.

Mr. Phelan: That will be the testimony of Mr. Zicarelli.

The Court: Mr. Zicarelli's testimony. (Stenographic transcript of testimony of Mr. Zicarelli above referred to by Mr. Phelan was received in evidence and marked Exhibit C-1.)

Mr. Phelan: The testimony of Mr. Russo will be C-2.

The Court: Mr. Russo's testimony is C-2.

(Stenographic transcript of testimony of Mr. Russo above referred to by Mr. Phelan was received in evidence and marked Exhibit C-2.)

The Court: Those exhibits that are marked, you better leave with me. This is Mr. Zicarelli's testimony. I think this is a copy of Mr. Russo's testimony.

Mr. Phelan: Yes. That will be fine.



*Excerpts of Transcript of Motion*

The Court: Now, let's see if I have the Occhipinti testimony? Well, I have an unmarked copy. Was that marked as an exhibit in the matter before Judge [78] Salvatore or not?

Mr. Phelan: It was not marked as an exhibit, your Honor. In that particular case, the Court Reporter actually read the questions and answers into the record.

Mr. Bozza: The testimony given by the Court Reporter that is contained therein.

The Court: Why don't we, to be consistent, mark this, too?

Mr. Phelan: That will be fine, too.

Mr. Bozza: I have no objection. Would that be C-3, Judge?

The Court: Yes. That will be C-3. (Stenographic transcript of the testimony of Mr. Occhipinti above referred to by Mr. Phelan was received in evidence and marked Exhibit C-3.)

Mr. Phelan: We also have for the record, your Honor, under that the exhibits which were attached to the petitions are being accepted by counsel for the witnesses, Mr. Zicarelli, Mr. Russo and Mr. Occhipinti, as establishing the procedural requirements of the Commission.

Mr. Querques: I am not so sure that I understand Mr. Phelan.

The Court: I have the petition here. Let's see what it is? I have a copy of it.

Well, there is a resolution. That is Exhibit A. [79] I have a subpoena and I have a letter of Notification dated August

*Excerpts of Transcript of Motion*

15, 1969, to the Attorney General relating to the immunity of the three witnesses, Mr. Zicarelli, Mr. Russo and Mr. DeCarlo, and a letter to the Prosecutor of Hudson County dated August 15, 1969, again relating to the proposed testimony of Mr. Zicarelli, and lastly the Resolution to compel the testimony, and again conferring immunity on Mr. Zicarelli.

Mr. Querques: Mr. Phelan has asked me to agree that he has followed the statute.

The Court: No. No. I think he asked that those exhibits be a part of the record.

Mr. Querques: Oh. If that is what he was asking then I have to concede that they were attached to the Petition and Order to Show Cause, because I have them, but I do think that in fairness to him and the Court, I should point out —

The Court: They will speak for what they are.

Mr. Querques: Right, but there is omitted any letter to the Prosecutor of Monmouth County, that county about which this investigation revolves with respect to Mr. Zicarelli.

Mr. Phelan: If it please the Court, at this time I would like to mark a copy of the letter that went to Mr. Keuper. Attached to it is a receipt signed by Mr. [80] Keuper that was returned to us. That letter is also dated August 15.

Mr. Querques: (Examining document.) May I check something? May I suggest, sir, that we be provided with a copy of that so

*Excerpts of Transcript of Motion*

our records would be complete? We had no knowledge of it until a minute ago.

Mr. Phelan: Yes.

The Court: That is C-4.

(Letter dated August 15, 1969, State Commission of Investigation, by Kenneth P. Zauher, to Vincent P. Keeper, Prosecutor of Monmouth County, above referred to by Mr. Phelan was received in evidence and marked Exhibit C-4.)

Mr. Phelan: Your Honor, may I request that I have copies made of this and leave the original with the Court so I will also have copies for the other counsel?

Mr. Pollack: I have a copy of that letter. It was in the petition that was given to me.

Mr. Bozza: And insofar as Mr. Occhipinti, we do have a copy of that letter. That is the one applying to Mr. Occhipinti.

The Court: Do you have one to make a copy?

Mr. Phelan: I do not, sir. If you care to read it first —

The Court: I assume it is similar to the other [81] letters. All right.

Well, now, we are down to the point of arguing about the questions, I take it.

\* \* \*

*Excerpts of Transcript of Motion*

[127] September 18, 1969

[Appearances as hereinbefore noted.]

\* \* \*

[Commencing at 145-16]:

Mr. Querques: . . . Now, Judge, if I may get back to the point with respect to the unconstitutionality of the immunity section of the statute. Again I am not going to argue the entire matter, because I know that you have read the briefs, and you have read the cases, but I do want to, as I said originally, add to that which is already in the brief, and I want to especially add to Section (b) of Point 2, wherein we took the position that the immunity provisions of the statute are in violation of the Fifth Amendment for failure to bar prosecution by a sister state or a [146] foreign sovereignty based upon compelled testimony.

Now, before I get into that, may I refresh your Honor's recollection by indicating that the other day when we were in executive session, if I may use that phrase, we put in the record certain documents which have been marked as exhibits, which have indicated as to my client, Mr. Zicarelli, he is now and has been a prime target for federal prosecution. There are other documents which indicate, and there was a stipulation which indicates that Mr. Zicarelli has been sought for purposes of interrogation and investigation in



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three counties of New York. As I recall them, Kings, Queens, and the Bronx.

Mr. Mathesius: I am going to respectfully object to this portion of Mr. Querques' argument which I thought we had discussed in chambers and which Mr. Querques asserted that this has already been submitted to the Court. It has already been discussed at length, and we are getting into the very area that Mr. Querques didn't want to get into. We are getting into it now only insofar as Mr. Querques wants to go. I assume that I will be the recipient of objection on the other side if I attempt to do the same thing. Therefore, I respectfully object to this portion of the argument which we are now getting into.

The Court: Well, I think we did discuss the matters that came up on Tuesday were over.

[147] Mr. Querques: That is correct.

The Court: And, of course, I indicated, and I realize that the question of the immunity granted by this statute certainly is a matter to be decided today, but I wish we would stop bringing out things that we did argue and were disposed of.

Mr. Querques: It wasn't intended that way, sir. If we just put this argument in its proper perspective — Now, it is because of what we talked about the other day, let me put it to you that way, that I urged upon your Honor what Justice Goldberg said in Murphy against the Waterfront Commission. Now, let me confess, I think all lawyers, when they read a case, they read it looking

*Excerpts of Transcript of Motion*

for a certain principle, and when they are reading it looking for one thing they miss everything else in the case. When we wrote this brief, we did not put in the brief a portion of the Murphy against the Waterfront Commission which is directly applicable here with respect to foreign prosecution.

If Mr. Zicarelli does have a problem with respect to foreign prosecution, then I say to your Honor that Murphy against the Waterfront Commission entitles him to invoke the Fifth Amendment in the State of New Jersey when asked a question, and that any offer of immunity under this statute in the State of New Jersey [148] does not nullify or negative or dissolve the right to take the Fifth Amendment. And I say that because Justice Goldberg said in the Murphy case, and he went all the way back — The interesting thing is he went all the way back to 1867, and discussed at length the case of United States of America against McRae, and when he decided the Murphy case, he gave United States of America against McRae vitality in 1967, 100 years later. And I think it is necessary for me to read, so your Honor can really appreciate it, what he said, because it pertains here exactly. He said in Murphy at page 688, 12 Lawyers Edition 2d, case beginning at page 678, "Where there is a real danger of prosecution in a foreign county, the case could not be distinguished in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of

*Excerpts of Transcript of Motion*

our own municipal law." So there he is saying that if you are in New Jersey or any place in the United States where the Fifth Amendment pertains throughout the country, and you are asked a question, the answer to which could be a cue or a link in a chain of evidence which might tend to incriminate you in a foreign jurisdiction, since the offer of immunity cannot protect you in the foreign jurisdiction, you don't have to answer. And that, sir, is the situation here.

[149] The same situation pertains, albeit, somewhat differently, with respect to sister state prosecution. This statute — And let me say, before I go there, they have acknowledged — I hope I am not intruding on what we said, but there is an acknowledgment that there are some sister state problems, let's put it that way, with respect to Mr. Zicarelli. Now, if that be true, and questions are put to him here, and if they confer the immunity, as they have made the attempt, the inquiry then becomes one of where is the man's constitutional protection? How does Zicarelli or anybody else, for that matter, get protection from the conferring of immunity in the State of New Jersey when that immunity has no binding effect in a sister state, just as it has no binding effect in a foreign country? The answer, again, I think is rather clear, that it has no effect, as a result of which, sir, if New Jersey is permitted to offer and confer the immunity and make it stick, we have a clear violation of what Murphy against the Waterfront Commission

*Excerpts of Transcript of Motion*

intends to prevent, and that is you have the whip-sawing effect. You get him into one courtroom or one Grand Jury or one executive session here in one state and you ask him questions and you confer immunity and you whip-saw him, you whip-saw him back and forth until you hook him. And that is what Murphy says you can't do. Unfortunately for [150] us, or maybe fortunately — I don't know which. It depends on how you look at it. But Murphy only said we will not let you whip-saw a witness in a state court only to use that testimony in a federal court, and vice versa. We will not let you whip-saw him in a federal building only to get him into a state building where you use the information that you got by reason of the whip-saw in the federal building. But there is nothing on the books except the spirit of Murphy and the intelligence of the United States against McCrae, and the new vitality given to the McCrae case by reason of Justice Goldberg's decision in Murphy to prevent that from happening other than good common sense, hard logic and intelligent application of existing legal principles.

If they can't give immunity which is universal, which is complete, then they haven't given it. Don't offer me a meal and then only give me the dessert. If you offer me a meal, give me the soup, give me the meat and potatoes, and then give me dessert. Don't start out and end with the dessert. This immunity that they talk about in New Jersey is a ruse and a decoy to destroy.



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Now, I think, sir, I have argued the constitutionality question, and unless you want me to go further, I would think respectfully that we ought to stop at that point and then develop the others later, so we [151] can keep everything in perspective. I know Mr. Bozza and Mr. Pollack want to say something about the constitutionality, but I have said all I want to say.

\* \* \*

[Commencing at 164-25]:

Mr. Zauber: . . . I would discuss very briefly the immunity [165] section. It seems very clear, if your Honor please, that with regard to an immunity conferred by anybody in this country, be it a Grand Jury, a court, an investigatory body such as the State Commission of Investigation, that in order for the witness to be fully protected, the protection given by the immunity must be coextensive with the privilege it seeks to displace. That is, subsequent to the witness having given testimony, he must be in the same position with regard to future prosecution that he was in prior to his having given the testimony. Now, this is known as a testimonial immunity. That is the conferring of an immunity such that the individual's testimony may not be used in a subsequent prosecution, nor may any fruits derived from that testimony.

Now, this is in contradistinction to what is known as a transactional immunity. That

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is that the individual may not be prosecuted for any transaction about which he testifies. Now, the type of immunity conferred by the statute which establishes the State Commission of Investigation is the former, that is it is a testimonial immunity and a more limited immunity, to be sure.

Now, the argument is made on behalf of the witness that this makes it constitutionally defective, that is that the immunity conferred in a statute [166] conferring a testimonial immunity is not sufficiently broad. I would respectfully urge that although it is true that many federal statutes, and indeed probably some other state statutes, confer a transactional immunity, that this is a broader protection than what is needed to confer upon a witness. What I mean by that is this; your Honor, the witness urges upon your Honor a holding that in order for an immunity to be adequate, it must be a transactional immunity. This is what has come to be known as a total bath. I would respectfully urge that the Constitution just doesn't have this kind of water in it. We need not confer a transactional immunity in order for that immunity section to be constitutional so long as any prosecution about a transaction about which the witness testifies is a prosecution based on untainted and independent evidence, then that prosecution is valid.

The witness wants a bonus, in other words. He wants the kind of protection which would completely wash out any prosecution in other

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jurisdictions or, indeed, within the confines of this State, even though that prosecution may have been developed completely on independent evidence. When I say "independent evidence," I mean independent from the testimony which he gives. I respectfully urge that the Constitution just simply [167] does not provide for this. The Fifth Amendment is a privilege against the use of an individual's testimony, and by subsequent judicial decree, the fruits of that testimony against the individual.

Now, it would be ludicrous to belabor that portion of the witness' argument which says that the immunity we conferred is inadequate because a sister state or a foreign jurisdiction may use that testimony, and there is no way on God's earth that we can prevent that. Well, your Honor, if we confer a transactional immunity, there is no way on God's earth that we could mandate the prosecutor of a foreign jurisdiction or the prosecutor of a sister state from utilizing that testimony. So that with respect to that argument, there would be no distinction whatsoever between a testimonial and a transactional immunity, and therefore, there could be no conceivable immunity statute which would be valid.

Further, if this argument were true, that is that the danger of a prosecution is a foreign jurisdiction would preclude the conferring of immunity within this jurisdiction, then the witness need only come in and say, "Well, I have committed a crime" or "It

*Excerpts of Transcript of Motion*

is alleged that I have committed a crime in a foreign jurisdiction or in a sister state, and an investigation is under way in that foreign jurisdiction, a continuing investigation [168] in a sister state, and, therefore, fellows, I am sorry, you can't confer any kind of immunity upon me that would be adequate, and therefore I need not testify." If your Honor please, Mr. Justice White in the Murphy case was not concerned with this type of argument. He laid it to rest. The Supreme Court of this State in *State vs. Spindel*, in upholding an immunity statute which conferred a testimonial immunity, was not concerned with this kind of argument.

I respectfully urge upon your Honor that although it is true that there are statutes which confer a transactional immunity, that this is not the kind of immunity which need be conferred upon an individual in order to give him the constitutional protection afforded by the Fifth Amendment, and that the testimonial immunity conferred upon any witness appearing before the State Commission of Investigation is adequate, and I rely upon the cases cited for your Honor and the distinctions in our brief of those cases cited by counsel for the witnesses, and the distinctions in those cases.

\* \* \*



**Decision**

September 18, 1969

[2] The Court: This matter has been brought before me as a result of a Verified Petition, executed by William F. Hyland, Chairman of the State Commission of Investigation, wherein he alleges that the Commission commenced an investigation into certain matters involving the City of Long Branch, and the County of Monmouth in New Jersey, and that pursuant to that investigation it caused a subpoena to be served upon the witnesses who appear before me and who are represented today, requiring them to appear before the Commission. Well, the witnesses appeared and all of them invoked their privilege against self-incrimination and refused to answer any of the questions which were asked of them by the Commission.

The Commission then moved and acted to compel this testimony and granted to the witnesses immunity from prosecution, and a Resolution to that effect was passed by the Commission. Thereafter, the witnesses appeared again before the Commission and again refused to answer the questions asked by the Commission, and again the witnesses invoked their privilege against self-incrimination, and that resulted in this petition being filed, and further resulted in the issuance of an Order to Show Cause why the witnesses should not be adjudged in contempt and committed to the Mercer County Jail until such time as they purge themselves of contempt by tes-

*Decision*

tifying as ordered.

A number of issues have been raised in this case, [3] and I will try to go over them one by one. They were set forth in the briefs which were submitted, and again we had further argument on the issues Tuesday last and again today.

The first contention that is made is that the statute creating the State Commission of Investigation, and the statutory scheme under which it operates, violates the due process clause. Reliance is placed upon the case of *Jenkins vs. McKeither*, a United States Supreme Court decision, wherein was challenged a labor-management commission in the State of Louisiana. In effect, what the witness contends is that the New Jersey Commission is an accusatory body and that it fails to provide the requisite due process procedures called for in a hearing before such accusatory body.

The Louisiana commission was solely limited to criminal law violations, and there was nothing in the act which created it which provided that its findings were to be used for any legislative purposes. The United States Supreme Court in that case held it exercised an accusatory function. However, the Commission which is being challenged in this case is not so limited to criminal law violations. It does have the power to conduct investigations relative to the enforcement of the law of the State, the conduct of public officers and employees, matters concerning public peace, safety and

*Decision*

justice, and all of these powers creating this Commission are set forth in Paragraph 2 to Paragraph 8 as has [4] been previously mentioned in the argument today.

It is my opinion that this matter before me is not controlled by the Jenkins case, since the functions of the two commissions are not entirely similar. Consequently, I determine that the New Jersey Commission is primarily investigatory in nature and not accusatory, as the one in Louisiana.

As a consequence of that, the procedural requirements necessarily surrounding accusatory proceedings are not requisite in the instant matter. As was stated in the case of *Hannah vs. Larche*, also a United States Court case, the investigative process could be completely disrupted if investigative hearings were transferred or transformed into trial-like proceedings.

There has been adopted in the state a code of fair procedure which is known as the Law of 1968, Chapter 316, and I feel that the procedures set forth therein, namely, that the witness is given a statement of the subject of the investigation. He has the right to be represented by an attorney. The attorney may submit proposed questions, and the Commission shall ask the witness such of the questions as it deems appropriate to the inquiry. And, finally, at the conclusion of the examination the witness has the right to file a sworn statement relative to his testimony which will be incorporated in the record. I feel that those rights granted a witness,

*Decision*

together with the procedures set forth in the act [5] creating the Commission meet the requirements of due process guaranteed to a witness under the Constitution.

The next contention that has been made is that the immunity provision of the statute is unconstitutional and that it violates the Fifth Amendment in that absolute immunity is not granted against future prosecutions for any offense to which the question relates, and, further, that it doesn't bar federal prosecution or prosecution by another state or a foreign county. I might point out that this issue has already been raised in the federal courts and two federal judges have already ruled upon this contention and determined that the testimonial immunity provisions granted under this act meet constitutional requirements. The two judges who ruled on this are Judge Coolahan and Judge Hastie. I also concede, as has been pointed out to me, that I am not necessarily bound by their determinations, that I have the right and the privilege of determining that issue as I see it.

The privilege against self-incrimination protects disclosures which could be used in a criminal prosecution or which would lead to other evidence that might be so used. And I don't think that an immunity statute is rendered unconstitutional because it leaves the witness subject to a subsequent prosecution, either in this state, another state, federal court or in a foreign country, so long as there is no causal connection between the



*Decision*

disclosure of the witness [6] and the evidence offered at the subsequent trial. The protection given by the immunity provision must be as broad as the Fifth Amendment privilege which it displaces.

The further contention is made that by the use of the phrase "responsive answer" as used in the statute, the witness is left to speculate whether or not his answer was responsive, and that he would be forced to answer without the security that he has gained immunity. As has been pointed out in one of the briefs, whether an answer given by the witness in good faith is responsive will ultimately have to be decided by a judge at a later hearing. I can't believe that any judge would subsequently determine that an answer given by a witness as responsive, and so accepted by the Commission as responsive, would not subsequently be held as being anything other than but responsive. I think the objection to that is somewhat far fetched, and, frankly, I don't think it is sufficient to render a statute compelling such an answer unconstitutional.

Again, it is my determination that the immunity provision of the statute does not violate the Fifth Amendment.

As to the argument that any testimony compelled to be given in this state might not be used in another state or federal court or a foreign country to develop further incriminating evidence, and thereby violating the due process clause of the Fifth and Fourteenth Amendments, in *Murphy* the [7]

*Decision*

court stated that once a defendant demonstrates that he has testified in a state proceeding in exchange for immunity to matters related to the federal prosecution, the government can be put to show that its evidence is not tainted by establishing that it had an independent, legitimate source for the disputed evidence; that obviously applying only to other states and the federal court. However, as I indicated, I feel that the immunity provision contained in this statute is constitutional, and I join the two federal judges who so held that.

\* \* \*

**Order (Zicarelli)**

(Filed 9/22/69)

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, MERCER COUNTY  
DOCKET NO. L-41598-68**

In the Matter of :  
JOSEPH ARTHUR ZICARELLI :  
charged with Civil Contempt :  
of the State Commission :  
of Investigation :

This matter having been opened to the Court upon the application of the State Commission of Investigation, KENNETH P. ZAUBER, ESQUIRE and WILBUR H. MATHESIUS, ESQUIRE, counsel for the State Commission of Investigation, appearing, for an order committing the above-captioned witness to the Mercer County Jail for the contempt committed before the said State Commission of Investigation, MICHAEL A. QUERQUES, ESQUIRE, attorney for witness appearing in opposition thereto, and the Court having considered the briefs submitted and oral argument having been heard, and, in accordance with the oral opinion recited on the 18th day of September, 1969, in open court, and for good cause shown;

It is, on the 22nd day of September, 1969,

ORDERED that JOSEPH ARTHUR ZICARELLI is hereby committed to the Mercer County Jail until such time as he purges himself of contempt by testifying as ordered; and

125a

*Order (Zicarelli)*

It is FURTHER ORDERED that the said commitment is hereby stayed contingent upon a Notice of Appeal to be filed by September 29, 1969.

s/ Frank J. Kingfield  
J.S.C.



**Opinion**

(Filed 1/20/70)

**SUPREME COURT OF NEW JERSEY  
A-57/58/59 September Term 1969**

In the Matters of )

JOSEPH ARTHUR ZICARELLI, )  
ROBERT BASILE OCCHIPINTI, and )  
ANTHONY RUSSO, Charged with )  
Civil Contempt of the State )  
Commission of Investigation. )

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JOSEPH ARTHUR ZICARELLI, )  
ROBERT BASILE OCCHIPINTI, and )  
ANTHONY RUSSO, )

Appellants, )

v. )

THE NEW JERSEY STATE COM- )  
MISSION OF INVESTIGATION, )

Respondent.

Argued December 15, 1969 — Decided Janu-  
ary 20, 1970

On appeal from the Superior Court, Law  
Division, Mercer County.

Mr. Michael A. Querques argued the cause.

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for appellant Zicarelli; Mr. Samuel D. Pozza argued the cause for appellant Occhipinti (Mr. Daniel E. Isles and Mr. Harvey Weissbard, of counsel and on the brief; Messrs. Querques Isles & Weissbard, attorneys for appellant Zicarelli).

Mr. William Pollack argued the cause for appellant Russo.

Mr. Wilbur H. Mathesius and Mr. Kenneth P. Zauber argued the cause for respondent.

The opinion of the Court was delivered by WEINTRAUB, C. J.

Appellants refused to answer questions before the State Commission of Investigation (herein S.C.I.) and persisted in that refusal notwithstanding a grant of immunity. Upon the S.C.I.'s application to the Superior Court, each was ordered to be incarcerated until he answered. We certified their appeals before argument in the Appellate Division.

## I.

Appellants contend the statute creating the S.C.I. denies due process of law in violation of the Fourteenth Amendment because individuals summoned before the Commission are denied the protections

*Opinion*

accorded an accused by the Bill of Rights.<sup>1</sup> The argument rests upon the false premise that the role of the S.C.I. is to decide whether an individual has committed a crime and to publicize the verdict. That is not its mission.

For this reason, appellants' reliance upon Jenkins v. McKeithen, \_\_\_\_ U.S. \_\_\_\_, 23 L. ed. 2d 404 (1969), is misplaced. That case involved a Louisiana statute which created a body called the Labor-Management Commission of Inquiry. The Commission consisted of nine members appointed by the Governor. The Commission could act only upon referral by the Governor when, in his opinion, there was substantial indication of "widespread or continuing violations of existing criminal laws" affecting labor-management relations. Upon such referral the Commission was to proceed by public hearing to ascertain the facts, and was required to determine whether there was probable cause to believe such criminal violation had occurred. Such findings were to be sent to appropriate federal or state law enforcement officials, and although not evidential in any trial, the findings were to be made public and could include conclusions as to specific individuals.

- 
1. The S.C.I. contends that appellant Zicarelli is estopped to argue the constitutionality of the statute in its entirety or of the immunity provision because he was defeated on both scores in a proceeding in the United States District Court for the District of New Jersey and withdrew his appeal from the judgment there entered. We pass this objection since the issue must be met at the behest of the other appellants, and even as to Zicarelli "collateral estoppel" would not be a satisfying basis for decision.

*Opinion*

In Jenkins the trial court dismissed the complaint on motion. Four members of the Court, in an opinion by Mr. Justice Marshall, thought there was enough to warrant a hearing upon the complaint and hence reversed the judgment; two members of the Court thought the statute was invalid on its face; and the remaining three voted to affirm the trial court's judgment upholding the statute.

Mr. Justice Marshall stressed that the Commission had no role whatever in the legislative process. He pointed to the Commission's power to make public findings with respect to individual guilt of crime and cited the allegations in the complaint that the power was so used "to brand them as criminals in public" (\_\_\_\_ U.S. at \_\_\_\_, 23 L. ed. 2d at 420). He continued that "In the present context, where the Commission allegedly makes an actual finding that a specific individual is guilty of a crime, we think that due process requires the Commission to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights," and as well the right to call witnesses, subject to reasonable restrictions. (\_\_\_\_ U.S. at \_\_\_\_, 23 L. ed. 2d at 421.) Finally the opinion emphasized that it did not hold that appellant was entitled to declaratory or injunctive relief but only that he was entitled to a chance "to prove at trial that the Commission is designed to and does indeed act in the manner alleged in his complaint, and that its procedures fail to meet the requirements of due process." (\_\_\_\_ U.S. at \_\_\_\_, 23 L. ed. 2d at 422.)



*Opinion*

It should be stressed that both the plurality opinion and the dissenting opinion unreservedly reaffirmed Hannah v. Larche, 363 U.S. 420, 4 L. ed. 2d 1307 (1960), which had rejected a similar attach upon the statute creating the Civil Rights Commission. Distinguishing Hannah, Mr. Justice Marshall in Jenkins said (\_\_\_ U.S. at \_\_\_, 23 L. ed. 2d at 419-420):

"The appellants in Hannah were persons subpoenaed to appear before the Civil Rights Commission in connection with complaints about deprivations of voting rights. They objected to the Civil Rights Commission's rules about nondisclosure of the complainants and about limitations on the right to confront and cross-examine witnesses. This Court ruled that the Commission's rules were consistent with the Due Process Clause of the Fifth Amendment. The Court noted that "[d]ue process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." 363 U.S., at 442, 4 L. Ed. 2d at 1321.

In rejecting appellants' challenge to the Civil Rights Commission's procedures, the

*Opinion*

Court placed great emphasis on the investigatory function of the Commission:

"[I]ts function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative and executive action." 363 U.S., at 441, 4 L. Ed. 2d at 1320.

The Court noted that any adverse consequences to those being investigated, such as subjecting them to public opprobrium, were purely conjectural, and, in any case, were merely collateral and "not . . . the result of any affirmative determinations made by the Commission . . . ." 363 U.S., at 443, 4 L. Ed. 2d at 1322."

The S.C.I. is in no sense an "accusatory" body within the meaning of Jenkins. Rather, in words which Jenkins repeated from Hannah, the purpose of the S.C.I. is "to find facts which may subsequently be used as the basis for legislative and executive action." This plainly appears from a review of the statute.

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The S.C.I. consists of four members, two appointed by the Governor and one each by the President of the Senate and the Speaker of the General Assembly. N.J.S.A. 52:9M-1. Section 2 of the statute reads:

"The commission shall have the duty and power to conduct investigations in connection with:

A. The faithful execution and effective enforcement of the laws of the State, with particular reference but not limited to organized crime and racketeering;

b. The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

c. Any matter concerning the public peace, public safety and public justice."

Section 3 provides:

"At the direction of the Governor or by concurrent resolution of the Legislature the commission shall conduct investigations and otherwise assist in connection with:

a. The removal of public officers by the Governor;

b. The making of recommendations by the Governor to any other person or body, with respect to the removal of public officers;

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c. The making of recommendations by the Governor to the Legislature with respect to changes in or additions to existing provisions of law required for the more effective enforcement of the law."

Section 4 requires the S.C.I. to investigate any department or State agency at the direction or request of the Legislature or the Governor or such department or agency. Upon the request of the Attorney General, a county prosecutor or any other law enforcement official, the S.C.I. shall cooperate with, advise and assist them in the performance of their official powers and duties. Section 5. The S.C.I. shall cooperate with federal officials in the investigation of violations of federal laws within the State; section 6, and may consult and exchange information with officers of other States, section 7 and whenever it shall appear to the Commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the Commission shall refer the evidence to the officials authorized to conduct the prosecution or to remove the public officer. Section 8.

The legislative mission of the S.C.I., evident in section 3 quoted above, is emphasized by section 10 which reads:

"The commission shall make an annual report to the Governor and Legislature which shall include its recommendations. The commission shall make such further interim reports to the Governor and Legislature, or



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either thereof, as it shall deem advisable, or as shall be required by the Governor or by concurrent resolution of the Legislature."

Section 11 does provide that

"By such means and to such extent as it shall deem appropriate, the commission shall keep the public informed as to the operations of organized crime, problems of criminal law enforcement in the State and other activities of the commission."

but section 11 does not require the S.C.I. to make and publicize findings with respect to the guilt of specific individuals and thus does not invite the problem involved in Jenkins. In other words, the S.C.I. can respect the demands of due process without disobeying the letter or the spirit of the statute. Nor does the discretion given by section 12 to hold public hearings in any way mandate an infraction of any constitutional right. Under the statute the S.C.I. may, and under the Constitution it must, work within basic limits.

We add that nothing occurred in the present matter which suggests the S.C.I. intends to transgress those limits. The S.C.I. met the provisions of the Code of Fair Procedure (L. 1968, c. 376), N.J.S.A. 52:13E-1 to 10. A copy of that statute was served upon each appellant with the subpoena, and the subpoena contained a sufficient statement

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of the investigation.<sup>2</sup> N.J.S.A. 52:13E-2. The right to have counsel present and to receive his advice, N.J.S.A. 52:13E-3 was respected. The hearing was private. There has been no trace of a purpose to deny due process.

In sum, then, we have a typical commission created to discover and to publicize the state of affairs in a criminal area, to the end that helpful legislation may be proposed and receive needed public support. That the commission may also aid law enforcement by gathering evidence of crime and transmitting it to the appropriate agency for evaluation or prosecution does not militate against the power of the Legislature to seek the facts for its own purposes through such a commission. We do not suggest that a commission whose role was solely to aid the executive branch by ferreting out evidence of guilt for transmittal to the executive officers would be barred by the Federal Constitution. No provision of that instrument stands in the way. Nor do we understand appellants to say there is. The federal attack under the present point is based on the due process clause, and the

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2. It read:

"Whether the laws of New Jersey are being faithfully executed and effectively enforced in the City of Long Branch, New Jersey, with particular reference to organized crime and racketeering; whether public officers and public employees in the City of Long Branch and in Monmouth County where it is located, have been properly discharging their duties with particular reference to law enforcement and relations to criminal elements; and whether and to what extent criminal elements have infiltrated the political, economic and business life of those areas."

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result does not turn upon whether the agency is characterized as "legislative" or "executive" or both. Rather the question is whether the agency, whatever its classic nature in the context of separation of powers, has an accusatory role, and if so, whether individual rights pertinent to an accusatory function have been denied. As to this, the answer is that the role of the S.C.I. is not accusatory and the rights accorded the individuals concerned are appropriate and adequate in the light of the agency's mission and powers.

We add that the United States District Court for the District of New Jersey rejected the same attack in Sinatra v. New Jersey State Commission of Investigation, decided January 9, 1970.

## II.

Appellants contend the statute violates Article III, Para. 1, which reads:

"The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."

The gist of the complaint seems to be that the statute's division of the power of appointment between the legislative and executive branches offends the provisions of the State Constitution dealing with appointments to office.

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Appellants say that if the S.C.I. is a legislative agency, the statute must fall because the power of appointment of two of the commissioners is allocated to the Governor. The power to appoint, as such, is not the special power of any one branch. Ross v. Board of Chosen Freeholders of the County of Essex, 69 N.J.L. 291, 294-296 (E. & A. 1903). The question then is whether there is something in the facts of this case which nonetheless requires the appointments to be made by the Legislature itself. We see no fundamental incongruity within the broad principal of Article III, Para. 1, quoted above, in permitting the Governor to appoint to a legislative agency. The Governor is a party to the legislative process. He is required to address the Legislature upon "the condition of the State" and to "recommend such measures as he may deem desirable." Art. V, §1, Para. 12. All bills must be presented to him for his approval or disapproval. Art. V, §1, Para. 14. Hence it cannot offend the policy of Art. III, Para. 1, to authorize the Governor to appoint to a "legislative" commission.

Now does any constitutional provision dealing with the specific subject of appointments forbid that course. On the contrary, the stated restriction with respect to appointments is upon the legislative branch alone. Art. IV, §V, Para. 5, provides that "Neither the Legislature nor either house thereof shall elect or appoint any executive, administrative or judicial officer except the State Auditor." See Richman v. Neuberger, 22 N.J. 28 (1956); Richman v. Ligham, 22 N.J. 40 (1956). Hence, if the S.C.I. is a legislative commission within the meaning of our State Constitution, no



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difficulty resides in the circumstances that the Governor shares the appointing power.

The alternative argument is that the S.C.I. must be deemed to be an executive agency and therefore the Legislature may not appoint because of the affirmative restriction upon a legislative appointment of any executive or administrative officer contained in Art. IV, §V, Para. 5, referred to above. In contending the S.C.I. is "executive" appellants stress the authority given the S.C.I. by the statutory provisions quoted in Point I to investigate at the request and in aid of the Governor or officers within his branch of government.

The power to investigate reposes in all three branches. Eggers v. Kenny, 15 N.J. 107, 114-115 (1954). And, absent a threat to the essential integrity of the executive branch, see David v. Vesta Co., 45 N.J. 301, 326 (1965), the Legislature may investigate official performance within the executive branch, for it is the responsibility of the Legislature to legislate with respect to executive offices and their powers and duties. This being an appropriate area for legislative inquiry, it is of no significance that Art. V, §IV, Para. 5, also empowers the Governor to investigate official performance within his department.

A separation-of-powers issue would arise only if the Legislature authorized the S.C.I. to go beyond investigation and to take action which invades an area committed exclusively to another branch. So, for example, if the S.C.I. were empowered to indict or to adjudicate charges of violation of our

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criminal laws, there would be an encroachment upon the judicial branch, David V. Vesta Co., supra, 45 N.J. at 326-327, and if the S.C.I. were authorized itself to prosecute criminal charges, the executive power would be involved. But the S.C.I. does none of this. Its investigation will at most yield material which may also be of interest to executive officials and be referred to them for handling. This being so, the S.C.I. is not vested with authority peculiarly executive in the sense of the separation-of-powers doctrine. Hence it cannot be said that the S.C.I. is an executive agency within the meaning of the provision barring legislative appointments of executive or administrative officers.

Nor does the statute offend Art. IV, §V, Para. 2, which reads:

"The Legislature may appoint any commission, committee or other body whose main purpose is to aid or assist it in performing its functions.\* \* \*"

This provision appears to focus upon the power of appointment, and authorizes the Legislature to exercise that power if the "main purpose" is to aid or assist that branch of government and inferentially to deny that power if the "main purpose" is to aid or assist another branch.

We must assume the Legislature intended to abide by the Constitution and that the "main purpose" was to aid the legislative branch. That the S.C.I. is directed to investigate at the request of the

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Governor or agencies within his department does not point the other way. Notwithstanding the executive aid which may ensue, the legislative interest persists, for the legislative power touches all things, subject only to restraints the Constitution imposes. It being within the power of the Legislature to appoint to a commission to inquire into performance in public office, to trace the tentacles of crime in the public and the private sectors, and to inform the Legislature and the public to the end that the sufficiency of existing legislation or the need for remedial measures may be known, the legislative purpose remains dominant notwithstanding that the product of investigations will be available to the executive branch. The separation-of-powers doctrine contemplates that the several branches will cooperate to the end that government will succeed in its mission. It is consistent with the legislative responsibility to provide that a legislative agency shall investigate an area of legitimate legislative interest upon an executive request or shall alert law enforcement agencies, state and federal, with respect to criminal events it uncovers. Hence the assistance to the executive branch, state and federal, does not dispute the premise that the "main purpose" of the S.C.I. is legislative.

## III.

Appellants contend the immunity provision of the statute violates the Fifth Amendment guarantee that no person "shall be compelled in any criminal case to be a witness against himself."

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N.J.S.A. 52:9M-17(b) provides that a person complying with the S.C.I.'s order to answer "shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate." Several objections are raised to the constitutional sufficiency of this immunity.

The first is that the statute does not grant a "transactional" immunity, *i.e.*, from prosecution for the offense to which the compelled testimony relates, but rather grants only a "testimonial" immunity, *i.e.*, protection against the use of the compelled testimony and the fruits thereof leaving the witness subject to trial upon the basis of other evidence the State acquires independently of that testimony. We believe the statute need go no further.

Appellants rely upon Counselman v. Hitchcock, 142 U.S. 547, 35 L. ed. 1110 (1892). There the statute protected the witness from the use of the evidence obtained from him but did not forbid the use of other evidence to which the witness's testimony might lead. The Court made it plain that the Fifth Amendment would not be satisfied unless the witness were also shielded from the evidence the prosecution uncovered by reason of the leads obtained from the witness, but in its final statement the Court spoke in terms which could be found to be more demanding. It said (142 U.S. at 585-586, 35 L. ed. at 1122):



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"We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the incriminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. In this respect, we give our assent rather to the doctrine of *Emery's Case*, in Massachusetts, than to that of *People v. Kelly*, in New York; and we consider that the ruling of this court in *Boyd v. United States*, 116 U.S. 616, supports the view we take. Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."

The last sentence in this quotation observes that the statute did not protect against use of the fruit of the compelled testimony, and thus states a narrower basis for decision than the opening proposition that a statute will not suffice unless it grants an absolute immunity from prosecution.

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The application of the self-incrimination clause to a defendant in a criminal proceeding is evident and simple, but the Constitution is read to protect as well a witness in every proceeding, and here difficulties arise. When the private interests of a witness are served by his silence, it is at the expense of litigants who need his testimony or at the expense of the State if the Witness thereby withholds what the public needs to know in a judicial or legislative inquiry. Discordant values are involved and the task is to reconcile their demands.

One approach could be to require the witness to answer and then to shield him from the use of the testimony thus compelled. We did that in a setting in which the good faith of the asserted fear of incrimination could not be tested. State v. De Cola, 33 N.J. 335 (1960). In general, however, the courts chose to permit the witness to refuse to answer, but since, if that right were absolute, the State could be denied evidence it needed for public prosecutions or investigations, the competing values were adjusted by requiring the witness to testify if the State conferred an immunity which would leave him no worse off than if his claim to silence had been allowed. On the face of things, an immunity against prosecution would exceed what the Fifth Amendment protects, for the Fifth Amendment protects the witness only with respect to what the witness himself can furnish and not from evidence from other sources.

At the time Counselman was decided, the immunity question concerned only the jurisdiction which sought to compel testimony. Counselman

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dealt with a federal statute and with the restraint the Fifth Amendment imposed upon the federal government. Since then the Fifth Amendment has been found to apply to the States as well, and in addition the view has taken hold that evidence the federal government or a State obtains by forbidden compulsion may not be used by either jurisdiction. In that setting, the scope of the required immunity assumes new significance. If the immunity must protect against prosecution with respect to any offense, both state and federal, to which the testimony relates, the States would be unable to compel testimony no matter how urgent the public need since they could not immunize a witness from federal prosecution. And although the Congress can, in furtherance of federal investigations, bar state prosecutions, still, the State's responsibility and interest in criminal matters being usually more pervasive and demanding, it might be too high a price to pay. See Knapp v. Schweitzer, 357 U.S. 371, 378-379, 2 L. ed. 2d 1393, 1400 (1958). In this new setting, the more acceptable solvent is to protect the witness against the use of his compelled testimony by both jurisdictions but with each remaining free to prosecute on the basis of evidence independently obtained.

The problem was accordingly resolved in those terms in Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 12 L. ed. 2d 678 (1964). The case involved a New Jersey statute which granted immunity from state prosecution but of course did not purport to protect the witness with respect to federal offenses. On the basis of prior



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decisions of the United States Supreme Court, we held the statute was valid even though the witness remained subject to federal prosecution. In re Application of Waterfront Commission of N.Y. Harbor, 39 N.J. 436 (1963). The United States Supreme Court agreed that the statute should be upheld, but upon the ground that the witness would indeed be protected in a federal prosecution by virtue of the Fifth Amendment itself. This conclusion had to reject the thesis that the Fifth Amendment required an immunity from prosecution rather than an immunity from the use of the coerced testimony. Indeed, Murphy read Counselman v. Hitchcock to have denounced the statute there involved, not because it failed to provide for immunity against prosecution, but because it did not protect the witness from the use of the fruit of the compelled testimony (387 U.S. at 78-79, 12 L. ed. 2d at 694-695). Murphy concluded in these words (378 U.S. at 79, 12 L. ed. 2d at 695):

"\* \* \* we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary



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rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity."

That Murphy rejected the view that the Fifth Amendment requires a grant of immunity from prosecution was emphasized in the concurring opinion of Mr. Justice White (378 U.S. at 93, 12 L. ed. 2d at 703).

In Albertson v. Subversive Activities Control Board, 382 U.S. 70, 15 L. ed. 2d 165 (1965), the Court, in summarizing Counselman v. Hitchcock, did include a reference in Counselman to "absolute immunity against future prosecution for the offense to which the question relates" but this issue was not in focus, and the opinion did not stop there, but rather pointed out that the immunity statute before it did not protect against the use of the compelled statement as evidence in all situations nor against the use of the leads it furnished (382 U.S. at 80, 15 L. ed. 2d at 172). The question whether an immunity against compelled testimony and its fruits is enough was left open in Stevens v. Marks, 383 U.S. 234, 244, 15 L. ed. 2d 724, 732 (1966). But in Gardner v. Broderick, 392 U.S. 273, 20 L. ed. 2d 1082 (1968), the Court said that "Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its

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fruit in connection with a criminal prosecution against the person testifying," citing both Counselman and Murphy (392 U.S. at 276, 20 L. ed. 2d at 1085). Thus the view of Murphy was reasserted.

We are satisfied that the Fifth Amendment does not require immunity from prosecution. An immunity of that breadth exceeds the protection the Fifth Amendment accords. More importantly to find that demand in the Fifth Amendment would in practical terms deny state government access to facts it must have to meet its duty to secure the well-being of all the citizens. We heretofore deemed the Constitution to require immunity against use of testimony rather than immunity from prosecution, see State v. Spindel, 24 N.J. 395, 404-405 (1957), and recently our Legislature, in adopting the Model State Witness Immunity Act, substituted an immunity from use for an immunity from prosecution. See In re Addonizio, 53 N.J. 107, 114-115 (1968).

There is a difference in that Murphy dealt with a federal-state setting whereas we are here dealing with the claim that our statute does not protect a witness from prosecution under our state law. But the question in both is the same, i.e., what immunity the Fifth Amendment requires in exchange for compulsion to answer. The values involved are the same. We see no sensible basis for a different answer. Gardner v. Broderick treated the issue as one and the same, citing both Counselman and Murphy. Murphy held and Gardner repeated that the Fifth Amendment requires protection only from the use of the compelled testi-

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mony and the leads it furnishes, and that protection our statute expressly provides. See United States v. McClosky, 273 F.Supp. 604 (S.D.N.Y. 1967); Application of Longo, 280 F.Supp. 185 (S.D. N.Y. 1967).

The remaining questions concerning self-incrimination may be disposed of quickly. It is contended the statutory immunity is inadequate because it does not protect a witness with respect to a prosecution in a sister State or in a foreign land. As to a sister State, it seems clear that if the Fifth Amendment requires protection against the use of the testimony by a sister State, the Amendment itself will provide that protection. Murphy can mean no less. United States v. McClosky, supra, 273 F. Supp. at 606; Application of Longo, supra, 280 F.Supp. 185; cf. In re Flanagan, 350 F.2d 746, 747 (D.C. Cir. 1965). As to a foreign land, even if Murphy means that liability under foreign law is now relevant, the danger in the case before us is too imaginary and unsubstantial to sustain a refusal to answer. See Murphy, 378 U.S. at 67-68, 12 L. ed. 2d at 688.

Nor do we see substance to the complaint that our statute protects the witness only with respect to "responsive" answers or evidence. The limitation is intended to prevent a witness from seeking undue protection by volunteering what the State already knows or will likely come upon without the witness's aid. The purpose is not to trap. Fairly construed, the statute protects the witness against answers and evidence he in good faith believed were demanded.

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## IV.

The orders under review provide that appellants shall be incarcerated until they answer the questions they refused to answer. Appellants contend the statute authorizes only a penal prosecution for contempt of the Commission, for which a fixed sentence must be imposed.

With reference to "contempt" of court, we have tried to distinguish sharply between (1) the public offense, i.e., "contempt," for which the court may punish the offender and (2) the injured litigant's right to apply for relief to satisfy his private claim arising out of the same offending act or omission. New Jersey Department of Health v. Roselle, 34 N.J. 331 (1961); In re Application of Waterfront Comm. of N.Y. Harbor, *supra*, 39 N.J. at 466; In re Carton, 48 N.J. 9, 19-24 (1966); In re Buehrer, 50 N.J. 501, 515-516 (1967). The procedure and rights of the person concerned depend very much upon the purpose of the proceeding, and hence our rule of court prescribes the processes carefully, to the end that he may know at once whether he is to meet a penal charge or the civil claim of a litigant, and may be afforded the rights appropriate to the proceeding. R. 1:10-1 to 5.

It would be helpful if legislative draftsmen abided by our semantics, but we cannot insist that they shall. Our responsibility remains to find and enforce the legislative intent.

N.J.S.A. 52:9M-17b provides that a person given immunity "may nevertheless be prosecuted for any



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perjury committed in such answer or in producing such evidence, or for contempt for failing to give an answer or produce evidence in accordance with the order of the commission, \* \* \* Appellants insist this language contemplates a penal prosecution and nothing else. But the sense of the situation goes strongly against that limitation, for the mission of the S.C.I. is to obtain facts for the Legislature and the mere punishment of a recalcitrant witness would not achieve that end.

We can think of no reason why the Legislature would want to permit a witness to block the inquiry if he is willing to accept a penalty. Mindful, as we are, that the expression "prosecution for contempt" has been used widely to describe a proceeding arising out of contumacy, whether the object of the proceeding is to compel compliance or to punish for noncompliance or both, we must seek the legislative design in that light, notwithstanding that the terms employed are not the ones we prefer. Here we have no doubt that the Legislature intended the S.C.I. to obtain the facts, whatever the wish of the person subpoenaed. The very provision for a grant of immunity repels the notion that a witness may choose to be silent for a price.

Nor is it critical whether the statutory language fits snugly within our rule of court relating to judicial proceedings in aid of subpoenas of a public officer or agency. R. 1:9-6. Subsection (a) deals with ex parte applications for compliance, subsection (b) with applications for compliance made on notice, and (c) with applications to

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"punish" where a statute authorizes that course. These provisions were intended to reflect statutory provisions of which the draftsmen of the rule were aware. Needless to say, the rule does not mean that the judiciary will withhold its hand unless the statute falls within the language of the rule. R. 1:1-2 provides that "In the absence of rule, the court may proceed in any manner compatible" with the purpose "to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Here appellants were plainly informed that the objective of the proceedings was to have them jailed until they complied with the order of the S.C.I. There can be and there is no complaint on that score.

We should add some further observations. The section of the statute here involved deals with defiance of the order of the S.C.I. itself rather than with defiance of an order obtained by the agency from a court. We see no difficulty in the circumstance that the statute does not call for an intermediate order by a court to be followed by enforcement of the court's mandate, but we point out that the absence of such an intermediate step does not deny a witness the opportunity to have the court pass upon the validity of the agency's order to answer. There was no misunderstanding here in that regard. Appellants were heard fully upon the propriety of the questions. They do challenge the validity of certain questions but there is no charge that the hearing before the trial court upon those objections was inadequate.

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## V.

The remaining issues warrant little more than mention.

Zicarelli and Occhipinti charge that the questions put to them offended their freedom of association guaranteed by the First Amendment. Sweezy v. New Hampshire, 354 U.S. 234, 1 L. ed. 2d 1311 (1957), which they cite, dealt with a legislative inquiry into political associations. Here the questions relate to an allegedly massive criminal organization, and to the witness's associations in that context. The subject matter is incontestably criminal and the interest of the State is manifest. We see no affront to the values protected by the First Amendment.

Appellants complain that the questions "sought to probe into the most secret recesses of the witness' minds and to expose these private thoughts to public view," and this they say is barred by the Fourth Amendment, alone or in conjunction with the First and Fifth Amendments. Granted the right of the Legislature to inquire, the pertinency of the questions and the sufficiency of the immunity with respect to self-incrimination, all of which must be accepted for the immediate purpose, the proposition advanced, simply stated, is that the Constitution prohibits a subpoena to a mere witness. It is plainly frivolous.

Appellants' reliance upon the Sixth Amendment appears to raise no issue beyond the due process question discussed in "I" above.

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Their further claim that if the statute is valid, it nonetheless has been so applied or implemented as to violate the Constitution has no basis.

The trial court properly refused to permit an examination of the Executive Director of the S.C.I. as to whether the agency already had the information it sought from appellants or whether the S.C.I. was following a path revealed by illegal wire-taps or bugging. As to the first, it would be an unwarranted interference with the legislative branch thus to superintend its exercise of its constitutional authority to investigate. It is difficult to conceive of a showing which would justify that course. Surely nothing before us suggests a serious issue in that regard.

With respect to the effort to learn whether evidence illegally obtained prompted the legislative investigation or the questions put to appellants, they cite no authority for the extraordinary proposition that such illegality will taint the legislative process. The suppression of the truth because it was discovered by a violation of a constitutional guarantee is a judge-made sanction to deter insolence in office. It is invoked in penal proceedings, and then only at the behest of a defendant whose right was violated. Farley v. \$168,400.97, 55 N.J. 31, 47 (1969). Even there, the wisdom of a suppression of the truth is not universally acknowledged. Farley, supra, 55 N.J. at 50. Appellants ask us to go further, and to suppress the truth on behalf of a mere witness, to the end that he may choose to be silent. Still more, appellants ask that we visit the sanction upon the



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legislative process, even though that process cannot result in a judgment against them. Pressed relentlessly and without regard to all other values, the sanction thesis could indeed deny the Legislature access to facts, and even taint a statute adopted in response to facts illegally revealed, but we think such an extension would be absurd.

Finally, Russo asserts the questions put to him are improper because they allegedly enter an area in which he had been convicted of perjury. The conviction, as described in his brief, was for perjury in denying to a grand jury that he had said to a policeman that he, Russo, had the Mayor and some councilmen of the City of Long Branch "in his pocket." We do not see a problem. His testimony before the S.C.I. could not be used in a retrial of that perjury charge. Nor do the questions here involved include the one which led to the conviction, so as to raise the prospect that if Russo repeats his former testimony he will be indicted on a fresh charge of perjury. We need not anticipate issues such an indictment might raise.

The orders are affirmed.

**Order - United States Supreme Court**

March 1, 1971

**91 ZICARELLI V. NEW JERSEY STATE COMM'N  
OF INVESTIGATION**

In this case probable jurisdiction is noted limited to questions 1, 2, 3, and 4 as set forth in the jurisdictional statement which read as follows:

"1. Whether a state immunity statute, and in particular N.J.S.A. 52:9M-17, which merely prevents the subsequent use of a witness's testimony and evidence derived therefrom is sufficient to supplant the Fifth Amendment's privilege against self-incrimination?

"2. Whether Counselman v. Hitchcock, 142 U.S. 547 (1892), which stated that 'absolute immunity against further prosecution' is required before the Fifth Amendment privilege may be supplanted, is still the law of the land?

"3. Whether the immunity statute in question, N.J.S.A. 52:9M-17 is constitutionally defective due to its provision that only a 'responsive' answer, or evidence derived therefrom will not be used against the witness, where the statute provides no guidelines for determining what is a 'responsive' answer?

"4. Whether the immunity statute, N.J. S.A. 52:9M-17, can supplant the Fifth Amend-

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ment privilege when it fails to provide immunity against foreign prosecution, with respect to an individual who has a real fear of such foreign prosecution?"

As to all other questions set forth in the jurisdictional statement, the appeal is dismissed for want of a substantial federal question.

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Exhibit WZ - 5B Life Magazine, Sept. 1, 1967

COVER

# LIFE

## BRAZEN EMPIRE OF ORGANIZED CRIME

The Alarming Growth of a Multibillion-Dollar Cartel  
Founded on Corruption, Terror and Murder



# Proconsul of the Boston Gang War

\* \* \*

**A**ctually "Bayonne Joe" Zicarelli's outwardly modest position as head of a bookie and lottery syndicate in Hudson County does him considerable injustice. True, in New Jersey, his interlocking tie-ups with scores of Hudson County officials are so expensive that some gangsters consider him a "connection-crazy" wastrel. But Zicarelli has an international sideline so extensive that he's practically a one-man state department for the Mob. He has holdings in Venezuela and the Dominican Republic, and throughout the hemisphere is known as the man to see for guns and munitions when a government is to be overthrown or a rebellion is to be put down. For example, through the years he shipped arms to Dominican leaders, selling with fine and profitable impartiality to Trujillo and the men who overthrew him. (In next week's issue more will appear on Zicarelli's business interests.)

Even Zicarelli's domestic connections extend well beyond the confines of Hudson County, into the chambers of the U.S. Congress itself. Indeed, he is on the best of terms with the widely respected Democratic representative from Hudson County, Congressman Cornelius E. Gallagher. Gallagher is one of the bulwarks of the House Foreign Affairs Committee and was seriously mentioned before the 1964 Democratic convention as a possible running mate for Lyndon Johnson. Bayonne Joe and his congressman seem to have a lot to talk over, judging from the frequency of their get-togethers. These usually take place a long way from Washington or Bayonne—where Gallagher lives and Zicarelli runs the rackets. Sometimes the setting is a picturesque wayside inn off the Saw Mill River Parkway, north of New York, and the occasion is an unhurried and chummy Sunday brunch.

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Exhibit WZ - 5C Life Magazine, Sept. 8, 1967

COVER

# LIFE

Brazen Empire  
of Crime, PART II

**HOW THE  
MOB MUSCLES INTO  
YOUR DAILY LIFE**

*Exhibit WZ - 5C Life Magazine, Sept. 8, 1967*

page 101

**The brazen attempt to spring  
Hoffa with a \$1 million bribe  
A case of**

# **THE FIX**

## **Hidden Flow of the Skim**

**T**he foremost internationalist among all Cosa Nostra entrepreneurs is neither skimmer nor stock swindler, but old Bayonne Joe Zicarelli—the Hudson County hustler of goods and politicians. “Joe Z’s” extensive line includes military aircraft parts, munitions and murder contracts.

Although Zicarelli, at 55, isn’t a top-notch in the Mob, the international operations he has conducted from the Manhattan of-

fices of the Latamer Shipping Co. show how well an enterprising Cosa Nostra second-stringer can make out if he hustles.

Zicarelli and the former Dominican Republic dictator, Rafael Trujillo, were fast friends. Trujillo shelled out more than \$1 million to Joe for machine guns, bazookas, etc. With Trujillo’s assassination, Zicarelli quickly proved he is without political bias: early this year, the U.S. State Department found

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that Joe's emissaries were dickering with present Dominican leaders to take over an airline.

Another friend was erstwhile Venezuela President Pérez Jiménez, during whose dictatorship Zicarelli landed a \$380,000 contract to supply aircraft parts to Venezuela. Profit: some \$280,000.

This was by no means the extent of Joe Z's Common Market. In the 1950s, when his deals with Venezuela were cooking, Zicarelli staunchly volunteered to officials of that country to arrange the assassination of the exiled Venezuelan political leader Romulo Betancourt. The plot bogged down in unseemly haggling over Zicarelli's fee: \$600,000.

There is no measure of how much money Zicarelli made from Trujillo. But in the past two years federal investigators have discovered that he did a lot of work, whatever the price. Details of just how much he did have never been disclosed until now. One of his little favors for Trujillo: the 1952 execution of Andres Requena, an

anti-Trujillo exile. Zicarelli gunmen shot Requena in Manhattan.

Next on Trujillo's list was another exile, Jesús de Galindez, a teacher at Columbia University. Joe Z arranged that one, too. In a famous case, De Galindez was kidnaped in Manhattan on March 12, 1956. At a Long Island airport, he was loaded aboard a private plane and flown by an American pilot, Gerald Murphy, to the Dominican Republic. Both De Galindez and Murphy vanished and are presumed to have been slain.

The plane used by De Galindez' abductors was chartered at the Linden, N.J. airport on March 5, 1956. Federal authorities have learned that the aircraft was chartered by Joe Zicarelli.

On his home ground in Bayonne, Joe Z has performed similar services for prominent people. For example, in the fall of 1962, the body of a Bayonne gambler was hauled by Zicarelli's men from the home of a Hudson County political figure—placing the politician more than slightly in Zicarelli's debt.



## **THE MOB**

This is the story of the corruption of a U.S. congressman by the Mob. Not just any congressman, but one of influence and importance both within the U.S. government and, to an extent, abroad—the Honorable Cornelius E. ("Neil") Gallagher, Democrat from New Jersey's 13th Congressional District, a key member of the House Committee on Foreign Affairs and the House Government Operations Committee, the chairman of the U.S. and Canadian Interparliamentary Group, and a former U.S. delegate to the Disarmament Conference. Gallagher, a man as prominent in the party as he is in government, was among the handful seriously considered by Lyndon B. Johnson as a possible running mate. He would have made an attractive candidate. He has

good looks, charm, intelligence—he once taught at Rutgers. His war record is impressive—as a captain he commanded a rifle company in Europe in World War II and Korea and was wounded three times, winning eight decorations.

As previously revealed in LIFE's continuing series on the Mob and its enterprises, organized crime has succeeded in planting its poisonous roots deep in American business, inside labor unions and city and state government. Now, an eight-month investigation by a team of LIFE reporters has established that the Mob has gauged yet another choice plum. Behind the facade of prestige and respectability lives another Neil Gallagher—a man who time and again has served as the tool and collaborator of a Cosa Nostra gang lord.



Organized crime continued: the case of a respected lawmaker

caught up in the grasp of Cosa Nostra

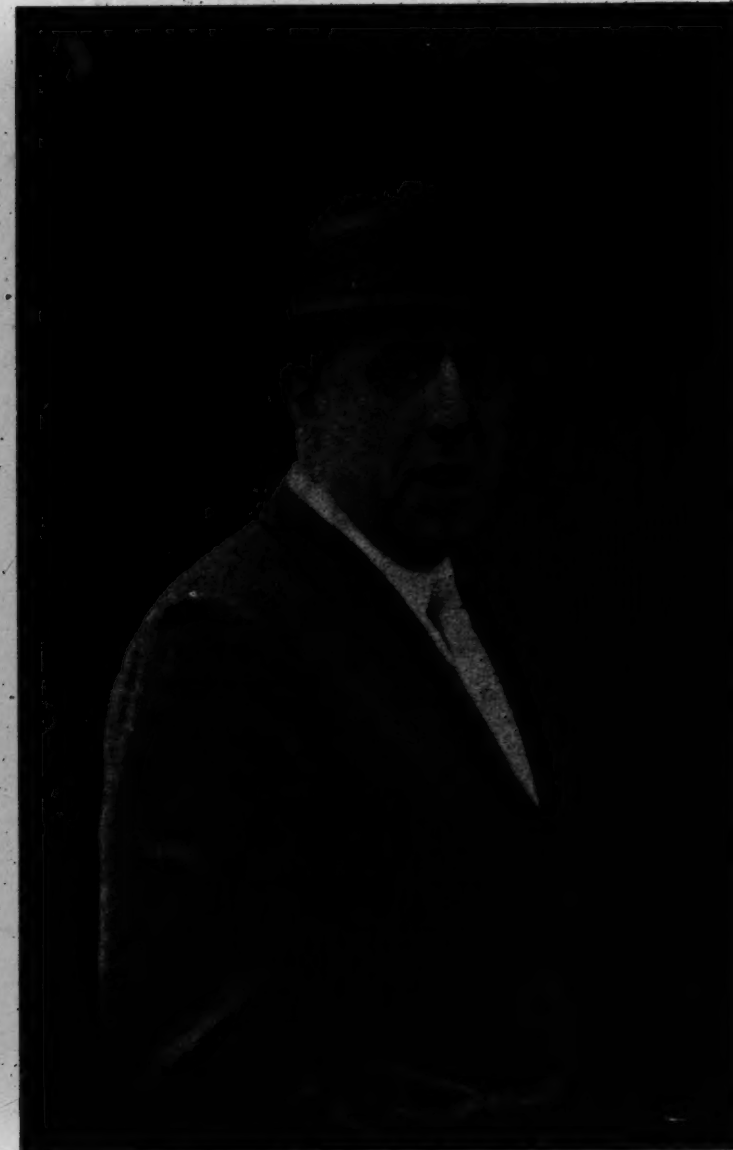
# The Congressman and the Hoodlum

## THE MOB

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In appearance—silver-haired, ruddily handsome—Congressman Cornelius E. Gallagher is the image of a dedicated public servant. Opposite is a man of another sort, gangster Joe Zicarelli, a New Jersey capo in Cosa Nostra. Ties bind the congressman and the hoodlum in an alliance of interests.



This article was prepared by a LIFE investigative team consisting of Russell Sackett, Sandy Smith and William Lambert.

Congressman Neil Gallagher's tie-in with this glowering Cosa Nostra figure, Joe Zicarelli, has ranged from his own home turf in Bayonne, N.J. to points as far distant as Montreal and Santo Domingo, capital of the Dominican Republic. It has involved such diverse interests as "fixes" with local New Jersey police, Caribbean politics, the promotion of a contraband "cancer cure" and a gangster's weird tale about the disposal of a corpse.

The story of Gallagher's availability to run the Mob's errands begins with conversations he had in the summer of 1960 with Zicarelli. The latter had a complaint. The police had strayed out of line and were putting heat on some of his men in the gambling rackets. Zicarelli wanted this nonsense stopped.

In Cosa Nostra, Zicarelli holds the rank of capo, or captain, in the fearsome Joe Bonanno "Family." In the rackets he is known by the nickname Joe Bayonne, derived from the New Jersey industrial waterfront city, which squats opposite Manhattan's towering financial district. This is Zicarelli's—and Gallagher's—power base. To Zicarelli, a political "connection"—or "The Fix"—is a thing of beauty, like cash in a Swiss bank, or two star sapphire pinky rings. Racketeering in all its profitable and ugly aspects is Zicarelli's trade, and his connections have kept him operating.

Above all, Zicarelli is cagey. For a long time, he followed the practice of issuing his orders to captive New Jersey politicians from public telephones.

On the morning of Monday, June 13, 1960, authorities began electronic surveillance of a Manhattan bar telephone booth from which Zicarelli conducted his business. They were interested solely in the mobster. The congressman came into the inquiry unexpectedly, and what to do about this has been troubling officials of the

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On June 13, from the pay telephone, Zicarelli called Gallagher's unlisted telephone at the congressman's law office in Bayonne. There was no answer. Zicarelli called the congressman's home. Gallagher wasn't there, either.

A week passed. The following Monday, June 20, Zicarelli called Gallagher's law office once again and placed two more calls to the congressman's home. Again Gallagher was out and this time Zicarelli asked the woman who answered to tell the congressman to "call Mr. Gray at the Murray Hill number."

On the next day, June 21, Zicarelli finally got through to Gallagher on the unlisted office telephone. He complained that the Bayonne police had staked out the



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key stations of his gambling network. His business was being disrupted, Zicarelli huffed, by the treachery of a top police official.

"O.K.," said Gallagher. "Let me get hold of him right now."

A few hours later, Zicarelli phoned Gallagher again at his office, demanding to know what the congressman had done for him.

"I got hold of a friend who said [the police official] was jumping," said Gallagher. "I got a hold of the little guy in Jersey City and told him to reach out for him [the police official]."

That night, a messenger from Bayonne appeared at the West Side apartment used by Zicarelli as a Manhattan hideaway. With the authorities listening in, he gave the gangster some bad news.

"One of the lightweights [an honest policeman] grabbed a guy [a Zicarelli runner] with a bag of money—return money," the messenger said. "Later, I laid it in to ----- [naming a Bayonne policeman]. I said you guys are wrong here, taking out money and then hugging people."

Zicarelli cautioned the messenger to keep his coat. "I talked to the top man," counseled Zicarelli. "Take it easy. Don't get excited. He'll see [the police official] tomorrow."

The following day, June 22, Gallagher called Zicarelli at the pay phone and was told that, so far as Joe was concerned, things were getting worse. Zicarelli understood that Hudson County authorities

had requested help from the New Jersey State Police to suppress gambling in Bayonne, and he wanted to know if there was any way the state police could be headed off.

"That has already been taken care of," replied Gallagher. He explained that a "meeting" had taken place that day and that he would have the "answer" in a short time.

## 'Mr. Gray' got him off the House floor

Zicarelli was unwilling to wait. On June 23 he telephoned Gallagher's home and tersely left word for the congressman to "call Mr. Gray."

It was two days later, Saturday, June 25, before Gallagher returned the call to Zicarelli at the pay phone. This colloquy followed:

Gallagher: I got hold of those people [Bayonne police] and there will be no further problem.

Zicarelli: I hope so, because they're ruining me.

Gallagher: They damn well better not.

Zicarelli: They're doing a job on me like was never done before.

Gallagher: I laced into them.

Gallagher said he would "fol-

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low through" on the job. He explained that he was going to Washington, and said that if Zicarelli would call him there he would call back.

A few days later Zicarelli, using the name of "Mr. Gray," did telephone Gallagher's office in Washington. One of the congressman's aides told him that Congress was in session and Gallagher was on the floor of the House of Representatives.

"Well, get him off the floor—this is important," commanded Zicarelli.

The aide, shaken by the imperious manner of "Mr. Gray," suggested that Mr. Gray call the Capitol direct. Zicarelli did, and Gallagher quickly left the House floor at the word that Mr. Gray was calling. The "important" message was simply that Joe Zicarelli wanted to see his congressman as soon as possible.

That telephone conversation was followed by a number of Sunday morning meetings between Gallagher and Zicarelli. Some of these brunch powwows (LIFE, Sept. 1, 1967) were uncovered by authorities who had Zicarelli under surveillance.

Small wonder, then, that Justice Department officials, who knew about Gallagher's connections with the Cosa Nostra capo, were apprehensive about testifying before a House subcommittee a year ago last spring (see box).

Under the chairmanship of

Dante B. Fascell, the hearings were delving into the federal effort against organized crime—and right there big as life-sat subcommittee member Gallagher. It was, as one Justice employe was later to observe, a little like having your cotton crop investigated by a boll weevil.

Gallagher had meanwhile become—with Missouri's Senator Ed Long (LIFE, May 26 and Nov. 10, 1967 and July 26, 1968)—a leading congressional spokesman against government invasions of privacy, including the very investigative technique that had first disclosed his own alliance with the Mob.

As the hearing proceeded, Congressman Gallagher reflected self-assurance in his questioning of a succession of federal enforcement officials. The thrust of his remarks was that organized crime—specifically the Mafia—was a vastly overblown concept, and that the federal effort against it was too big a weapon for the size of the target, and that innocent people could be wrongly damaged through unwitting association with mobsters.

"Sometimes I have the feeling," he said, "as we go down the path into all sorts of uncharted areas, especially in the area of computers and the invasion of privacy, that if there had been no Mafia, perhaps Big Government would have had to invent one."

In due course he came around to what might have been most on his mind. "When you get into the exotic fields that the organized

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"crime unit has got into . . . it is quite conceivable that anybody who ever was in the same theater with an organized crime identified type is going to find that moment in his life frozen into a government computer, and forever more he remains part of the organized crime complex."

Early last month three LIFE reporters paid a visit to the congressman's offices in Washington after he had agreed to discuss the information gathered by this magazine. With Attorney Lawrence I. Weisman at his side, Gallagher was asked if he had "any association" with Zicarelli.

"No," said the congressman.

After that flat assertion, the following was said:

Q: [You] never called him or talked to him?

A: Let me tell you something. Can I talk off the record? I want to level with you. I want to level with you.

Q: I don't think we ought to get off the record on a thing like this.

A: Okay, then, we won't. Mr. Zicarelli on several occasions has called me—ah, one way or another—about his son who was a doctor trying to get into med school and he thought he was being discriminated against. . . . One day he called me straight here.

Q: Did you say he called you here?

A: A long time ago. I think twice. I think when the kid was trying to get into medical school.

Q: At your office?

A: Yes. And I think one time in the hustle and bustle and nobody was here and the phone call came through over in the other place [the House]. It was over on the floor . . . he called there cold and said: "I hope you don't mind." I tried to brush him off as best I could, saying it was a long day or something. He said: "Well, I'm a taxpayer. . . . Well, you know, kiddingly, or whatever the hell."

Q: Did you ever get any calls from a Mr. Gray?

A: Mr. Gray. . . . I think that is who he [Zicarelli] said he was. I don't know. He didn't say who was . . . I think that's probably how the hell he got on the line.

Q: Why would he get on the line any faster if he said he was Mr.

## Joe Zicarelli needed help to buy an airline

Gray than if he said he was Mr. Zicarelli?

A: Well, I wouldn't get on the line if I knew it was Mr. Zicarelli. You know, you've got to try to be circumspect about these goddam things and not hurt a person's feelings or get anybody angry at you.

Q: But you did know who he was?

A: What?

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Q: Do you know who Joe Zicarelli was?

A: Not the first time. Not the first time. I guess he just figured I got in through one time before. But I would try to duck it as much as I could.

At another point in the interview, Gallagher was asked, "Did you ever telephone Zicarelli?"

"Never," he replied.

Q: Absolutely never?

A: Never.

Q: It's not possible that you're making a mistake?

A: That I called Joe Zicarelli? No.

Gallagher also denied that he had met with Zicarelli at any time, in a restaurant or any other place. At this point, Attorney Weisman interjected:

"The congressman said that they [the meetings] did not take place. I haven't talked with the congressman about this but I'll put something on the table and test your sense of fairness. He's willing to take . . . I would advise him to take a lie detector test to determine whether these are the facts. . . ."

Gallagher quickly cut in:

"Hey, let me say something. I don't believe in lie detector tests. They're snake oil. That's one of the reasons I'm where I am, because of the investigations that I've had with all this stuff and I became a target because. . . . I believe there should be some integrity in what the hell we do and not believe in the whole question of the drift toward a police

state and McCarthyism with its new name, Mafiaism. And probably that's why I'm being slammed a little bit right now."

Q: The information we have is that you did, in fact, intercede for Zicarelli with the Bayonne police department to slow up investigations that the Bayonne police were making into his lotteries and other gambling that he has over there. Now, I'd like a response to that.

A: I categorically deny that that ever happened. I never had any influence with the police in Bayonne.

Q: Did you ever speak to any public official in Bayonne in connection with Joe Zicarelli's operations?

A: I have—uh—Joe Zicarelli is like a legend in Bayonne. All the ex-fighters and all the people who he probably handed out money to, to help, or something . . . I don't know.

Q: Did you ever speak to a public official in Bayonne in connection with Joe Zicarelli's interests?

A: No, I never did.

Later the interview got into the fact that Gallagher currently is one of three partners in a home construction firm in Bayonne, known by a number of names including Edmart, Inc. The other two partners are Dr. Martin Turkish, a Bayonne physician, and Edward Slifka. At the time of Zicarelli's overheard phone calls, as it turns out, Slifka was the deputy police commissioner of Bayonne.

The congressman seemed especially ill at ease when questioned



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about Edmart.

Q: Were you equal partners in this thing, Congressman?

A: A . . . yes. I hesitate on it because on . . . of the things that I did not like to appear as a partner on the building was, if you're in politics you obviously . . . what I'm undergoing now is . . . takes place many times. But the other problem in politics is that if you appear as a principal in building there are all kinds of people in . . . local political people who set up straw men [so] that you would have to call them and say: "Would you please remove that straw man?" It might be just the issuance of a permit, or a water pipe, or to turn the heat on, whatever the little thing may be. They set up a pattern of harassing you to the point where . . . and as soon as you call them for that they say: "Oh, by the way, I've got a brother-in-law. Can you get him a job?" Or whatever. It's give and take like that. So for those reasons I never really appeared as an equal partner, but in fact I am an equal partner. I appear as the attorney.

Q: Has it been lucrative?

A: Well, I can't say that I'm getting rich on it. But it's \$25,000 . . . \$30,000 . . .

Q: Has it been producing that every year?

A: I can't say it produced it this year.

Slifka, the congressman's present partner, also had turned up in the electronic surveillance over

Zicarelli.

On Sept. 15, 1960, when he was still deputy police commissioner, he called Zicarelli on the pay telephone the gangster was using at the time. Slifka wanted Zicarelli to know that Gallagher was off on a 10-day trip.

"I know, I spoke to him earlier," said Zicarelli. "Where's he going?"

Europe and Africa, Slifka answered proudly. "He's no longer a kid," he said. "He's representing the U.S. all by himself. He's the next governor. He was at the armory this morning and they gave him an ovation as big as Kennedy's [President John F. Kennedy]." Slifka and Zicarelli agreed that Neil Gallagher certainly was a fine fellow.

## Secret traffic in an illegal 'cancer drug'

Among Gallagher's considerable attributes, so far as Zicarelli was concerned, was his seat on the prestigious House Foreign Affairs Committee. For all his small-town nickname, Joe Bayonne had important foreign affairs of his own—among others, with the Dominican Republic, to which he sold arms during the terrorist regime of Ra-

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fael Trujillo.

In the scramble that followed Trujillo's assassination, however, Zicarelli was reaching for a new grip. When Joaquin Balaguer—once Trujillo's puppet president—was elected head of state in 1966, Zicarelli saw his chance to get control of the republic's faltering airline, *Compañía Dominicana de Aviación*. Even as a legitimate business its prospects were good, once the tourists started returning. But as a licensed international carrier which *Cosa Nostra* could put to use in all the shady trades in which it specializes, it could be a flying bullion lode.

The gangster's attorney, Stephen Hoffman, who had served as registered agent for Balaguer during the latter's exile in the U.S., was on hand for Balaguer's inauguration on July 1, 1966. Gallagher also was there, in the official delegation from Washington. Early the following year, on a visit that some federal authorities are convinced was directly connected with Zicarelli's bid for the airline, Hoffman flew down again. So did Congressman Gallagher—on the same plane, in fact. They met and talked.

President Balaguer later confided to a friend that Gallagher, during his visit, had professed himself interested in sugar investments "and any other kind of business deal he can put together." Indeed, the congressman told embassy officials on arriving that the nature of his trip was "personal." Yet Gal-

lagher told LIFE that the trip had the official sanction of the Foreign Affairs Committee and various government departments he had consulted. The committee, he said, had picked up the tab for the trip.

Even so, the U.S. embassy in Santo Domingo was embarrassed by the circumstances of Gallagher's visit and the fact that it coincided with that of Hoffman, whose Balaguer-Zicarelli affiliations were well known. Embassy officers cabled Washington that the congressman had assured them he was "trying to keep Hoffman at arm's length." (Later Gallagher told LIFE he had never discussed Hoffman's presence with anyone at the embassy.) Ambassador John H. Crimmins told the State Department he regretted Gallagher's involvement in the island republic, and said it appeared the congressman was "naive."

Despite the efforts of his envoys, Zicarelli never did pull off the airline deal. But the activity in Santo Domingo does follow a pattern that repeats itself where Zicarelli and the congressman are concerned: when and where the gangster needs influential help, along comes Congressman Gallagher. Another example: Laetrile.

Laetrile, a purported cancer drug, is manufactured in Canada by a firm called Biozymes International Ltd. and promoted by the McNaughton Foundation. Both are headed by Andrew R.L. McNaugh-

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ton, the swashbuckling son of the late General A.G.L. McNaughton, distinguished Canadian soldier and diplomat. The use of Laetrile, which is made chiefly from an extract of peach and apricot pits, is illegal both in Canada and in the U.S. If it could be government approved Biozymes International stock would become very valuable indeed. This was a situation bright with the prospects of profit for a man like Joe Zicarelli, with his Washington connections.

The McNaughton Foundation gives callers the names of four doctors said to be treating cancer patients with the drug. One of the doctors is located in Italy, two others in Mexican border towns.

The fourth doctor practices in Union City, N.J.—the heart of Zicarelli country—at the clinic where Joe Zicarelli himself is being treated for "anxieties." (The doctor told a LIFE reporter Zicarelli is receiving "placebo therapy," i.e., sugar pills, for his nerves.)

In a remarkably candid interview with two LIFE reporters in Montreal on May 1, McNaughton admitted: "I am doing something highly illegal in your country.

"First of all," he said, "the diversion of Laetrile from Canada to the U.S. is an offense against the Canadian food and drug regulations. Secondly, it's an offense against the American food and drug regulations. Thirdly, it's an illegal act to take it across the border—and I suppose you could find 10 other crimes that are involved

in it. We are doing this on a reasonably large scale. . . ." Zicarelli, said McNaughton, has an interest in smuggling Laetrile into the U.S., where he said at least 150 patients are now being illegally treated with the drug. McNaughton said that Steve Hoffman, who had been his attorney and a stockholder in Biozymes International, had introduced him to Zicarelli. He also said he strongly suspects that the gangster, using another man's name as a front, had donated between \$100,000 and \$130,000 to the nonprofit McNaughton Foundation. And he guessed that Zicarelli might, under someone else's name, also be a stockholder in Biozymes.

It was Hoffman, according to McNaughton, who also introduced him to "the man who can do the job [for Laetrile] in Washington . . . introduce us around, get us favorable consideration from the Food and Drug Administration." Enter, once again, Congressman Gallagher.

"Gallagher was to take us to the Veterans Administration, Bethesda [Naval Hospital], Walter Reed, you name it," said McNaughton. "Hoffman said, 'Gallagher's the man.' I said, well, he'll expect some recompense, and Hoffman said, 'We'll work it out.'" Gallagher denied that anyone talked to him about recompense. The appointments were made, all right, but the presentations misfired and Laetrile remains an unauthorized and, for



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now, unprofitable drug.

Congressmen often do constituents favors and see that they get hearings in the halls of the capital. Gallagher claimed that is all he was doing for Laetrile—at the request of a constituent, Dr. John A. Morrone. Now deceased, Dr. Morrone was a Jersey City surgeon and a close friend of Joe Zicarelli.

As it turns out, helping Dr. Morrone was not Congressman Gallagher's only interest in the contraband drug. Until recently one of the directors of Biozymes was Gallagher's friend and law partner, E. A. ("Ed") Dembe. Of the total stock issue of Biozymes, the largest single block—some 1.2 million shares—is held in the name of the Broadway National Bank of Bayonne. Ed Dembe is one of the bank's owners. Congressman Gallagher is a director.

Dembe claims he did not know of Gallagher's connections with Laetrile at the time he became a director of the manufacturing firm and later when he agreed to let his bank become nominee for the Biozymes stock in a strange agreement with an old friend of his, Steve Schwartz. (Schwartz is a gun-runner and international operator

who is tied to mobster Carmine Galante, a fellow capo of Zicarelli's in the Bonanno Family of Cosa Nostra. Schwartz was also in Santo Domingo at the same time Gallagher and Hoffman were there, but no one is quite sure why.) Dembe told two LIFE reporters he presumed the stock actually belonged to Schwartz, but "I never had a pinpoint, detailed, hold-'em-up-against-the-wall conversation with Steve" about it. Dembe said the stock certificates are not held in the Bayonne bank, but "someplace up in Canada."

Gallagher claims he knew nothing of his partner's or the bank's involvement with the stock until "after you fellows talked to Ed die."

When interviewed by LIFE, all parties—McNaughton, Hoffman, Dembe and Congressman Gallagher—made essentially the same request: don't write anything that's going to hurt the fight against cancer. Gallagher was asked if a congressman wasn't sticking his neck out a bit to go to bat for a cancer drug unknown to him, being promoted by men he claimed were virtual strangers. "Look," he said, "if Bonnie and Clyde had a cure for cancer, you should listen."





# JURISDICTIONAL STATEMENT





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In The

**Supreme Court of the United States**

No. 

69-4

**JOSEPH ARTHUR ZICARELLI,**

*Appellant,*

*vs.*

**THE NEW JERSEY STATE COMMISSION OF INVESTIGATION,**

*Appellee.*

**ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY**

**JURISDICTIONAL STATEMENT**

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In The  
**Supreme Court of the United States**

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No.

**JOSEPH ARTHUR ZICARELLI,**

*Appellant,*

*vs.*

**THE NEW JERSEY STATE COMMISSION OF  
INVESTIGATION,**

*Appellee.*

*On Appeal from the Supreme Court of New Jersey*

---

**JURISDICTIONAL STATEMENT**

Appellant appeals from the judgment of the Supreme Court of New Jersey, entered on January 20, 1970, which affirmed an order of the Superior Court of New Jersey, Law Division, Mercer County (dated September 22, 1969), and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

### **Opinion Below**

The opinion of the Supreme Court of New Jersey is not yet officially reported and is attached hereto as Appendix A.

### **Jurisdiction**

The proceeding below was instituted as a result of a petition by William F. Hyland, Chairman of the New Jersey State Commission of Investigation, a body created and governed by N.J.S.A. 52:9M-1 et seq. The petition requested, and resulted in, the issuance of an order to show cause why appellant should not be adjudged in contempt due to his failure to answer certain questions before the Commission after purportedly having been granted immunity pursuant to N.J.S.A. 52:9M-17, and why he should not be committed to jail until such time as he should purge himself of the contempt. The order to show cause was issued on August 20, 1969, and a hearing was held thereon in the Superior Court, Law Division, Mercer County, on September 16 and 18, 1969. On the latter date the trial court found appellant to be in contempt of the Commission and ordered him to be committed to the Mercer County Jail until such time as he should purge himself of contempt by testifying before the Commission as ordered.

The judgment of the Superior Court was entered on September 22, 1969. The judgment of the Supreme Court of New Jersey, which affirmed the action of the trial court, was entered on January 20, 1970, and the notice of appeal was filed in that court on February 2, 1970. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States



Code, Section 1257(2). With respect to the non-appealable issues presented herein, jurisdiction is sustained by Flournoy v. Wiener, 321 U.S. 253, 256 (1943).

### Questions Presented

The following questions are presented by this appeal:

1. Whether a state immunity statute, and in particular N.J.S.A. 52:9M-17, which merely prevents the subsequent use of a witness's testimony and evidence derived therefrom is sufficient to supplant the Fifth Amendment's privilege against self-incrimination?

2. Whether Counselman v. Hitchcock, 142 U.S. 547 (1892), which stated that "absolute immunity against further prosecution" is required before the Fifth Amendment privilege may be supplanted, is still the law of the land?

3. Whether the immunity statute in question, N.J.S.A. 52:9M-17 is constitutionally defective due to its provision that only a "responsive" answer, or evidence derived therefrom will not be used against the witness, where the statute provides no guidelines for determining what is a "responsive" answer?

4. Whether the immunity statute, N.J.S.A. 52:9M-17, can supplant the Fifth Amendment privilege when it fails to provide immunity against foreign prosecution, with respect to an individual who has a real fear of such foreign prosecution?



5. Whether the statute creating the New Jersey State Commission of Investigation, N.J.S.A. 52:9M-1 et seq., both on its face and as applied in this case, violates the due process clause of the Fourteenth Amendment by its failure to provide the minimal due process standards set forth in Jenkins v. McKeithen, \_\_\_ U.S. \_\_\_, 23 L. Ed.2d 404 (1969)?

6. Whether the decision in this case, which interprets N.J.S.A. 52:9M-17 as providing for incarceration of a witness who refuses to answer questions before the State Commission of Investigation after having been granted immunity, until he answers such questions, but which provides no expiration date for the incarceration, violates the due process clause of the Fourteenth Amendment and the Eighth Amendment's ban on cruel and unusual punishment?

7. Whether inquiry into a witness's association with others, unrelated to specific criminal conduct, violates the First Amendment's right to freedom of association?

8. Whether inquiry into a witness's beliefs, criminal or otherwise, violates the First Amendment?

### Statutes Involved

New Jersey Statutes Annotated, 52:9M-1 to 9M-18, and 52:13E-1 to 13E-10, are set forth at length in Appendix B hereto. N.J.S.A. 52:9M-17, which is the immunity section of the above statute, provides as follows:

"a. If, in the course of any investigation or hearing conducted by the commission pursuant to this act, a person refuses to answer a question or questions or produce evidence of any kind on the ground that he will be exposed to criminal prosecution or penalty or to a forfeiture of his estate thereby, the commission may order the person to answer the question or questions or produce the requested evidence and confer immunity as in this section provided. No order to answer or produce evidence with immunity shall be made except by resolution of a majority of all the members of the commission and after the Attorney General and the appropriate county prosecutor shall have been given at least 24 hours written notice of the commission's intention to issue such order and afforded an opportunity to be heard in respect to any objections they or either of them may have to the granting of immunity.

"b. If upon issuance of such an order, the person complies therewith, he shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of

his estate, except that such person may nevertheless be prosecuted for any perjury committed in such answer or in producing such evidence, or for contempt for failing to give an answer or produce evidence in accordance with the order of the commission; and any such answer given or evidence produced shall be admissible against him upon any criminal investigation, proceeding or trial against him for such perjury, or upon any investigation, proceeding or trial against him for such contempt."

#### Statement

Appellant was subpoenaed to appear before the New Jersey State Commission of Investigation, a body created pursuant to N.J.S.A. 52:9M-1 et seq. (118a).<sup>1</sup> The subpoena stated that the investigation concerned, generally, the enforcement of the law in Long Branch, New Jersey with particular reference to organized crime and racketeering. The reverse side of the subpoena set forth the text of N.J.S.A. 52:13E-1 et seq., which was the Act establishing a code of fair procedure to govern state investigating agencies and which applied to the hearing before the Commission. Pursuant to the subpoena appellant appeared before the Commission on July 8, 1969. He was ordered to return on July 10 and, in response to questions asked of him on that date, invoked his privilege against self-incrimination and refused to answer. He was then ordered to reappear on August 20, 1969.

1. References are to the page numbers in the Joint Appendix filed with the Supreme Court of New Jersey and which has been certified to this Court as a part of the record below.



On August 20, appellant appeared before the Commission in executive session, and was asked a series of 100 questions. Appellant was purportedly granted immunity pursuant to N.J.S.A. 52:9M-17 but asserted his privilege in response thereto (42a-87a). In asserting his privilege appellant, through counsel, specifically challenged the constitutionality of the statute under which the Commission operated (46a), the constitutionality of the immunity provision (49a-50a), the invalidity under the Eighth Amendment of the contempt process (49a), as well as raising other constitutional infirmities in the hearing process and stating some of the reasons therefor (46a-50a). Immediately upon completion of the questions, appellant was served with a petition and order to show cause returnable forthwith before a Judge of the Superior Court (113a-124a). The order directed appellant to show cause why he should not be adjudged in contempt and committed to the Mercer County Jail until such time as he purges himself of contempt by testifying as ordered (126a).

On September 16, a hearing was held upon the Order to Show Cause. During the course of the hearing counsel for the Commission and counsel for appellant agreed to stipulate certain matters which appellant had sought to prove during the hearing. These were as follows:

"(1) That Zicarelli had been the object of very extensive publicity referring to him not only as a racketeer and a member of Cosa Nostra, but also an 'internationalist' in



crime [10-21 to 25].<sup>2</sup>

(2) That Zicarelli's activities, associations, and reputation are well known to the Commission [11-2 to 5].

(3) That Zicarelli had been the subject of numerous subpoenas, surveillances and investigations over the past ten years by both federal and state authorities [11-8 to 12].

(4) That Zicarelli was, by governmental pronouncement, a main or prime target for prosecution [11-5 to 8]."

Also placed in evidence at the hearing was a newspaper report, stipulated to be essentially correct, of an extensive interview with the Executive Director of the Commission (52-13 to 53-10; 184a-187a) as well as numerous newspaper and magazine articles dealing with appellant and his reputed activities (55-17 to 61-25). It was also stipulated that detectives from the New Jersey State Police had questioned appellant in January, 1968 concerning the alleged bribery of a former state police superintendent and that the state police had also served Zicarelli with a subpoena in May, 1968, directing him to appear before a grand jury in New York (73-21 to 75-5).

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2. These pages and line references are to the official transcript of the September 16 and 18 hearings which were filed with the Supreme Court of New Jersey and have been certified to this court as a part of the record below.

### How the Federal Questions are Presented

The opinion of the Supreme Court of New Jersey ruled upon all but one of the constitutional questions presented on this appeal. The decision rejected appellant's contention that:

"the statute creating the Commission denies due process of law in violation of the Fourteenth Amendment because individuals summoned before the Commission are denied the protections accorded an accused by the Bill of Rights" (App. A 3a).

In this respect it found that appellant's reliance on Jenkins v. McKeithen was "misplaced." With respect to appellant's argument concerning the immunity provision, N.J.S.A. 52:9M-17, the court held that a grant of "testimonial immunity" is sufficient to supplant the Fifth Amendment privilege against self-incrimination and that "transactional" immunity, or immunity from prosecution, need not be provided (App. A 15a-22a). The court held that Counselman v. Hitchcock requires no more. The court likewise considered, and rejected, appellant's claim that the statute failed to provide immunity from foreign prosecution (App. A 22a) and that its provisions requiring a "responsive answer" made it unconstitutional (App. A 22a). Appellant's First Amendment attacks on the proceedings were also rejected (App. A 26a). All of these same questions were raised initially in the trial court and ruled upon by it. However, since the issues were actually considered and decided by the State Supreme Court reference to the lower court proceedings is not deemed necessary. Charleston Federal Sav. & Loan Assn. v. Alderson, 324 U.S.

182 (1944), rehearing denied, 324 U.S. 888. The only issue presented herein which was not passed upon the Supreme Court was that respecting the constitutionality of the indefinite incarceration for contempt. However, that issue was raised and ruled upon by the trial court (8-25 to 9-17) and was fully briefed in the Supreme Court (App. Brief 74-76).<sup>3</sup> Thus, it is properly before this Court.

### **The Federal Questions are Substantial**

1. This case squarely presents the question of the validity of a state immunity statute which merely provides immunity from the use of the compelled answer or its fruits, but which fails to provide for immunity from prosecution. The Court below held that N.J.S.A. 52:94-17(b) was constitutional despite its failure to accord appellant "transactional immunity," and further held that an immunity of that breadth "exceeds the protection the Fifth Amendment accords." That ruling raises a substantial issue of the first magnitude and one that is of great importance to both state and federal governments.

As recently as Stevens v. Marks, 383 U.S. 234 (1965), both Mr. Justice Douglas speaking for the Court, Id. at 244, and Mr. Justice Harlan, joined by Mr. Justice Stewart, concurring in part and dissenting in part, Id. at 249, noted that the validity of such a statute as sufficient to supplant the constitutional privilege against self-incrimination is still an open question. While noting that Counsel-

3. That brief has been certified to this Court as a part of the record below.

man v. Hitchcock, 142 U.S. 547, 586 (1892), pointed to a negative answer, Mr. Justice Harlan felt that "the question ought not to be decided until it is necessarily presented after a full briefing and argument by the parties" 383 U.S. at 249. This case squarely and necessarily presents that issue.

Counselman v. Hitchcock, supra, held that the constitutional privilege against self-incrimination cannot be supplanted by legislation unless the immunity given is as broad as the scope of the privilege itself. The court stated as follows:

"We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the incriminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates" 142 U.S. at 585-586. (Emphasis added.)

Both Congress and the states have, with few exceptions, read Counselman as requiring immunity from prosecution. For the past seventy years virtually every major federal regulatory statute has included such an immunity provision. 8 Wigmore, Evidence §2281, n. 11 (McNaughton ed. 1961); Wendel, Compulsory Immunity Legislation



and the Fifth Amendment Privilege, New Development and New Confusion, 10 St. Louis U. Law J. 327, 371 (1966); Note, 72 Yale L.J. 1568, 1611 (1963). Indeed, as recently as 1968 in the most wide ranging immunity act ever passed, Congress adhered to the Counselman requirement, 18 U.S.C. §2514. The states have likewise, with rare exception, followed suit. See the cases collected in 53 A.L.R. 2d 1030, despite the fact, that until 1964 they were not interpreting a federal constitutional requirement. Over the years this Court also has continued to cite Counselman with approval, e.g. Ullman v. United States, 350 U.S. 442 (1956).

Confusion, however, entered the scene with Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964). That decision concerned the question of whether

"one jurisdiction within our federal structure may compel a witness whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction" 378 U.S. at 53..

While purporting to apply Counselman, Id. at 78, Mr. Justice Goldberg held:

"...the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We con-

clude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits" Id. at 79.

In his concurring opinion, Mr. Justice White, joined by Mr. Justice Stewart, stated that in his view Counselman did not require immunity from prosecution, Id. at 100-107. The majority, as noted, did not purport to abandon Counselman but rather reaffirmed its validity. If, however, Counselman's requirement of absolute immunity from prosecution set forth a constitutional principle then Malloy v. Hogan, 378 U.S. 1 (1964) would have had the necessary effect of making that same requirement obligatory upon the states. However, if Murphy is read to require only immunity from use, then the Court was actually narrowing the privilege while purporting, at the same time, to extend it. Since Murphy was directed only to an inter-jurisdictional situation it can be argued that it did not reach the intra-jurisdictional holding of Counselman and thus left that decision unaffected. Thus, there would be two co-existing standards, one for intra-jurisdictional situations and another for inter-jurisdictional. Note, 61 Northwestern U. L. Rev. 654, 666 (1966). However, such a construction, it has been noted, would run afoul of this Court's rulings in other areas which have sought to prevent double standards for state and federal governments. Note, 20 Rutgers, L. Rev. 336, 344 (1966).

Reading Murphy as replacing immunity from

prosecution with immunity from use, it has been subject to extensive criticism by distinguished commentators. Professor Wendel, has stated that Murphy "added new confusion to an already troubled legal principle" 10 St. Louis L.J. at 328. He suggests that Mr. Justice Goldberg's language was "inadvertent," and that the decision "leaves immunity legislation on balance as unsettled as ever." The issue was put cogently by Professor Duncan:

"Either Counselman is constitutionally necessary, in which case the Murphy rule permits encroachment upon the privilege with serious consequences for the values protected by the privilege, or else Murphy is constitutionally adequate and Counselman grants an unnecessary measure of immunity with unacceptable social costs to the community when individuals escape the application of criminal sanctions." Duncan, Federalism and the Fifth; Configuration of Grants of Immunity, 12 U.C.L.A. L. Rev. 561, 578 (1965).

For other criticisms, see 39 N.Y.S.B.J. 105 (1967). Mr. Justice White's concurring opinion has been likewise subject to attack. Note, 20 Rutgers L. Rev. 336, 340 (1966); Wendel, supra.

The opinion below held that "Murphy rejected the view that the Fifth Amendment requires a grant of immunity from prosecution." Two lower federal court decisions appear to have also accepted this view. United States v. McCloskey, 273 F. Supp. 604 (S.D.N.Y. 1967); Application of Longo, 280 F. Supp. 185 (S.D.N.Y. 1967). It is difficult,



however, to see how that comes about in light of the statements in the subsequent case of Stevens v. Marks, supra, that the question is still open. The matter is even further clouded by seemingly conflicting references to Counselman in the post-Murphy decisions of Albertson v. Subversive Activities Control Board, 382 U.S. 70, 80 (1965) and Gardner v. Broderick, 392 U.S. 273, 276 (1968). The questions involved are substantial and are important if Congress and the States are to be guided correctly in their enactment of immunity legislation. What is undoubtedly the most significant federal immunity statute ever considered is presently pending in the Congress, S. 30, 91st Cong. 2d Sess. §201 et seq., which would repeal all existing federal immunity legislation and substitute therefore a single, all-encompassing immunity provision which would only provide for testimonial immunity. This clearly points up the significance of the question posed in this case.

2. The immunity statute in question also presents the substantial question as to whether it runs afoul of the constitution by imposing a condition upon the grant of immunity. The statute protects the witness only if his answer is "responsive." Our research reveals no other immunity statute with such a provision. The court below rejected this attack by noting that the witness would be protected against answers which "he in good faith believed were demanded." However, the witness would be placed in the untenable and precarious position of not having any assurance at the time the answer is given that years later, perhaps, it may not be used against him as a result of a finding by another court that, in retrospect, his answer was not responsive. It is gen-



erally held that a grant of immunity may not be made dependant on a condition: Annotation, 53 A.L.R.2d 1030, 1051; Ferrantiello v. State, 256 S.W.2d 587, 595 (Tex. Ct. Cr. App. 1953). This provision thus destroys even the limited grant of immunity conferred by the statute. It not only fails to fully supplant the constitutional privilege, but would seem to render the statute void for vagueness. This Court has often held that language which leaves one uncertain as to the conduct it prohibits fails to meet the requirements of the Due Process Clause. Giaccio v. Pennsylvania, 382 U.S. 399 (1966). This is precisely true in this case.

3. This case also presents the question as to whether appellant must be accorded immunity from foreign prosecution, at least where he presents evidence that he has a real fear of such prosecution. It is suggested that Murphy v. Waterfront Commission, supra, adopted as our law the principle set forth in the English case of U.S.A. v. McRae, Lr. 3 Ch. App. 79 (1867), that:

"where there is a real danger of prosecution in a foreign country, the case could not be distinguished 'in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of our own municipal law'" 378 U.S. at 67.

Appellant presented evidence to the trial court that he had been publicized as an "internationalist in crime" yet the court below held the danger was "too imaginary and insubstantial to sustain a refusal to answer."

4. This case also presents a substantial question as to whether the statutory procedures employed by the New Jersey Commission of Investigation meet minimal due process standards as enunciated by this Court in Jenkins v. McKeithen, — U.S. —, 23 L. Ed.2d 404 (1969). In determining what constitutional protections must be accorded to a witness before such a Commission the Court was there concerned with whether the Commission was "accusatory" in its nature or merely a fact-finding body whose sole purpose was to provide a basis for subsequent legislative action. The validity of such a truly fact-finding group had been upheld in Hannah v. Larche, 363 U.S. 420 (1960), which had dealt with the Civil Rights Commission. The Commission at issue in this case is a far cry from that under scrutiny in Hannah and, while lacking certain distinctive features of the Louisiana Commission in Jenkins, it is clearly sufficiently accusatorial in nature to call for those protections found to be required, by Jenkins.

The New Jersey Commission contains numerous hallmarks of prosecutorial agency. It has both the power and the duty to conduct wide-ranging investigations with respect to criminal law enforcement, N.J.S.A. 52:9M-2; cooperation with federal and state law enforcement officials is required, N.J.S.A. 52:9M-5, 9M-6, 9M-7; and the Commission is directed to refer evidence of crime to the appropriate prosecuting authorities, N.J.S.A. 52:9M-8. The Commission is also empowered to make public its findings as to organized crime and other aspects of criminal law enforcement. N.J. S.A. 52:9M-10. Furthermore, the Commission is given authority to conduct wiretapping and eavesdropping pursuant to N.J.S.A. 2A:156A-8, along

with the State Attorney General and the County Prosecutors, surely an unusual power for a legislative fact-finding body. Additionally, it may be noted that all of the Commission's staff members are former prosecutors, as is its Executive Director.

While the New Jersey Commission is not directed to name individuals guilty of specific crimes, as was the Louisiana Commission in Jenkins, the totality of the powers and duties of the New Jersey Commission serve to bring it much closer in specie to the Louisiana group than to the Civil Rights Commission sustained in Hannah. The fact that the Commission may recommend legislation, N.J.S.A. 52:9M-3(c), and make annual reports to the Governor and Legislature, N.J.S.A. 52:9M-10, does not alter its basic nature. As pointed out, appellant was called as a witness in what purported, according to his subpoena, to be a criminal investigation concerned with law enforcement in Long Branch, New Jersey, with particular reference to organized crime and racketeering. The questions asked of appellant in his appearance before the Commission likewise make clear the accusatorial nature of the proceedings. The New Jersey Supreme Court rejected this view, finding the Commission and its procedures sustainable on the authority of Hannah v. Larche, supra.

If indeed the Commission is accusatory in nature then it is clear that its procedures do not meet those minimal due process requirements set forth in Jenkins. Indeed, the New Jersey Commission provides even less protection than the Louisiana group. N.J.S.A. 52:13E-1 to 10. The awesome and wide-ranging powers given to this Commission



thus raise substantial questions under the Constitution and prior decisions of this Court.

5. Appellant was committed to jail until he should purge himself of contempt by testifying as ordered before the Commission. Neither within the statute or the Court's Order is there any termination date for the incarceration. In Shillitani v. United States, 384 U.S. 364 (1966), this Court sustained the use of a coercive imprisonment for civil contempt based upon refusal to answer questions before a federal grand jury. However, the Court specifically noted that the confinement had to be limited to the life of the grand jury since the justification for such imprisonment "depends upon the ability of the contemnor to comply with the Court's order," Id. at 371. No decision of this Court has ever sanctioned the indeterminate type of contempt sentence imposed in the present case. Presumably, if appellant is steadfast in his refusal to answer he will remain imprisoned for the rest of his life. The oft mentioned rationale that the witness carries the keys of his prison in his pocket is surely not a sufficient answer to the complex question this poses.

Judge Friendly recently expressed the thought that such an indefinite confinement of a non-complying accused would violate the Due Process Clause. United States v. Doe, 405 F.2d 436, 438 (2d Cir. 1968). One commentator has also noted that:

"once the defendant has decided to undergo the penalty rather than obey, the likelihood of effective coercion becomes increasingly



small and the accumulation of penalties may assume an excessively vindictive character." Note, Proceedures for Trying Contempts in Federal Courts, 73 Harv. L. Rev. 353, 358 (1959).

Such a disproportion between the punishment and the offense also raises serious and substantial questions under the Eighth Amendment, with its modern emphasis on civilized standards and "idealistic concepts of dignity," Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).

These questions were directly raised in appellant's appeal to the New Jersey Supreme Court (App. B. 74-76), and in the trial court (8-25 to 9-13), but were not passed upon by the New Jersey Supreme Court in its decision. The question is substantial and of great public importance due to the increasing use of the contempt power in both state and federal proceedings.

6. The proceeding below constituted a serious abridgement of appellant's freedom of association and belief. These are rights, of course, which cannot be supplanted by a grant of immunity. Many of the questions asked of appellant before the Commission were of the "Do you know---" variety. Such questions sought, impermissibly, to probe into appellant's associations with others in a most general way. The questions were not directed to ascertaining whether the witness and the person inquired of were, or had been, engaged in any specific criminal enterprise, but, on their face, dealt merely with associations. Such inquiry would appear to be prohibited under Sweezy v. New Hampshire, 354 U.S. 234 (1957). The fact

that that case dealt with merely so-called political associations does not distinguish it, in principle, from the instant situation. Whether such an inquiry is to be permitted because the investigation deals with criminal matters presents a substantial question under the First Amendment.

Similarly, the questions sought to probe into appellant's beliefs, another area protected by the First Amendment, regardless of the nature of such questions. As Mr. Justice Douglas said in Brandenburg v. Ohio, \_\_\_ U.S. \_\_\_, 23 L. Ed. 2d 430, 439 (1969):

"One's beliefs have long been thought to be sanctuaries which government could not invade.... But I think that all matters of belief are beyond the reach of subpoenas or the probings of investigations. That is why the invasions of privacy made by investigating committees was notoriously unconstitutional."

**Conclusion**

It is submitted that the decision of the Supreme Court of New Jersey in sustaining the validity of the statutory procedure governing the State Commission of Investigation, its immunity power and its right to impose indefinite sentences for contempt, seriously erred in its interpretation of governing law. We believe that the questions presented by this appeal are not only substantial but are of immediate and grave public importance, so as to merit the filing of briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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**Appendix A**

**Opinion**

**SUPREME COURT OF NEW JERSEY**  
**A-57/58/59 September Term 1969**

In the Matters of )

JOSEPH ARTHUR ZICARELLI, )  
ROBERT BASILE OCCHIPINTI, and )  
ANTHONY RUSSO, Charged with )  
Civil Contempt of the State )  
Commission of Investigation. )

---

JOSEPH ARTHUR ZICARELLI, )  
ROBERT BASILE OCCHIPINTI, and )  
ANTHONY RUSSO, )

Appellants, )

v. )

THE NEW JERSEY STATE COM- )  
MISSION OF INVESTIGATION, )

Respondent. )

**Argued December 15, 1969 — Decided**



On appeal from the Superior Court, Law Division, Mercer County.

Mr. Michael A. Querques argued the cause for appellant Zicarelli; Mr. Samuel D. Bozza argued the cause for appellant Occhipinti (Mr. Daniel E. Isles and Mr. Harvey Weissbard, of counsel and on the brief; Messrs. Querques Isles & Weissbard, attorneys for appellant Zicarelli).

Mr. William Pollack argued the cause for appellant Russo.

Mr. Wilbur H. Mathesius and Mr. Kenneth P. Zauber argued the cause for respondent.

The opinion of the Court was delivered by

WEINTRAUB, C. J.

Appellants refused to answer questions before the State Commission of Investigation (herein S.C.I.) and persisted in that refusal notwithstanding a grant of immunity. Upon the S.C.I.'s application to the Superior Court, each was ordered to be incarcerated until he answered. We certified their appeals before argument in the Appellate Division.

I.

Appellants contend the statute creating the S.C.I. denies due process of law in violation of the Fourteenth Amendment because individuals summoned before the Commission are denied the protections

accorded an accused by the Bill of Rights.<sup>1</sup> The argument rests upon the false premise that the role of the S.C.I. is to decide whether an individual has committed a crime and to publicize the verdict. That is not its mission.

For this reason, appellants' reliance upon Jenkins v. McKeithen, \_\_\_ U.S. \_\_\_, 23 L. ed. 2d 404 (1969), is misplaced. That case involved a Louisiana statute which created a body called the Labor-Management Commission of Inquiry. The Commission consisted of nine members appointed by the Governor. The Commission could act only upon referral by the Governor when, in his opinion, there was substantial indication of "widespread or continuing violations of existing criminal laws" affecting labor-management relations. Upon such referral the Commission was to proceed by public hearing to ascertain the facts, and was required to determine whether there was probable cause to believe such criminal violation had occurred. Such findings were to be sent to appropriate federal or state law enforcement officials, and although not evidential in any trial, the findings were to be made public and could include conclusions as to specific individuals.

In Jenkins the trial court dismissed the complaint on motion. Four members of the Court,

1. The S.C.I. contends that appellant Zicarelli is estopped to argue the constitutionality of the statute in its entirety or of the immunity provision because he was defeated on both scores in a proceeding in the United States District Court for the District of New Jersey and withdrew his appeal from the judgment there entered. We pass this objection since the issue must be met at the behest of the other appellants, and even as to Zicarelli "collateral estoppel" would not be a satisfying basis for decision.

in an opinion by Mr. Justice Marshall, thought there was enough to warrant a hearing upon the complaint and hence reversed the judgment; two members of the Court thought the statute was invalid on its face; and the remaining three voted to affirm the trial court's judgment upholding the statute.

Mr. Justice Marshall stressed that the Commission had no role whatever in the Legislative process. He pointed to the Commission's power to make public findings with respect to individual guilt of crime and cited the allegations in the complaint that the power was so used "to brand them as criminals in public" (\_\_\_ U.S. at \_\_\_, 23 L. ed. 2d at 420). He continued that

"In the present context, where the Commission allegedly makes an actual finding that a specific individual is guilty of a crime, we think that due process requires the Commission to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights. . . ."

and as well the right to call witnesses, subject to reasonable restrictions (\_\_\_ U.S. at \_\_\_, 23 L. ed. 2d at 421). Finally the opinion emphasized that it did not hold that appellant was entitled to declaratory or injunctive relief but only that he was entitled to a chance "to prove at trial that the Commission is designed to and does indeed act in the manner alleged in his complaint, and that its procedures fail to meet the requirements of due process" (\_\_\_ U.S. at \_\_\_, 23 L. ed. 2d



at 422).

It should be stressed that both the plurality opinion and the dissenting opinion unreservedly reaffirmed Hannah v. Larche, 363 U.S. 420, 4 L. ed. 2d 1307 (1960), which had rejected a similar attack upon the statute creating the Civil Rights Commission. Distinguishing Hannah, Mr. Justice Marshall in Jenkins said (\_\_\_ U.S. at \_\_\_, 23 L. ed. 2d at 419-420):

"The appellants in Hannah were persons subpoenaed to appear before the Civil Rights Commission in connection with complaints about deprivations of voting rights. They objected to the Civil Rights Commission's rules about nondisclosure of the complainants and about limitations on the right to confront and cross-examine witnesses. This Court ruled that the Commission's rules were consistent with the Due Process Clause of the Fifth Amendment. The Court noted that '[d]ue process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.' 363 U.S. at 442, 4 L. Ed. 2d at 1321.

"In rejecting appellants' challenge to the Civil Rights Commission's procedures, the



Court placed great emphasis on the investigatory function of the Commission:

'[I]ts function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative and executive action.' 363 U.S. at 441, 4 L. Ed. 2d at 1320.

The Court noted that any adverse consequences to those being investigated, such as subjecting them to public opprobrium, were purely conjectural, and, in any case, were merely collateral and 'not . . . the result of any affirmative determinations made by the Commission. . . .' 363 U.S. at 443, 4 L. Ed. 2d at 1322."

The S.C.I. is in no sense an "accusatory" body within the meaning of Jenkins. Rather, in words which Jenkins repeated from Hannah, the purpose of the S.C.I. is "to find facts which may subsequently be used as the basis for legislative and executive action." This plainly appears from a review of the statute..

The S.C.I. consists of four members, two ap-

pointed by the Governor and one each by the President of the Senate and the Speaker of the General Assembly. N.J.S.A. 52:9M-1. Section 2 of the statute reads:

"The commission shall have the duty and power to conduct investigations in connection with:

a. The faithful execution and effective enforcement of the laws of the State, with particular reference but not limited to organized crime and racketeering;

b. The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

c. Any matter concerning the public peace, public safety and public justice."

Section 3 provides:

"At the direction of the Governor or by concurrent resolution of the Legislature the commission shall conduct investigations and otherwise assist in connection with:

a. The removal of public officers by the Governor;

b. The making of recommendations by the Governor to any other person or body, with respect to the removal of public officers;

c. The making of recommendations by the Governor to the Legislature with respect to changes in or additions to existing provisions of law required for the more effective enforcement of the law."

Section 4 requires the S.C.I to investigate any department or State agency at the direction or request of the Legislature or the Governor or such department or agency. Upon the request of the Attorney General, a county prosecutor or any other law enforcement official, the S.C.I. shall cooperate with, advise and assist them in the performance of their official powers and duties. Section 5. The S.C.I. shall cooperate with federal officials in the investigation of violations of federal laws within the State, section 6, and may consult and exchange information with officers of other States, section 7, and whenever it shall appear to the Commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the Commission shall refer the evidence to the officials authorized to conduct the prosecution or to remove the public officer Section 8.

The legislative mission of the S.C.I., evident in section 3 quoted above, is emphasized by section 10 which reads:

"The commission shall make an annual report to the Governor and Legislature which shall include its recommendations. The commission shall make such further interim reports to the Governor and Legislature, or either thereof, as it shall deem advisable, or as shall be required by the Governor or by concurrent resolution of the Legislature."

Section 11 does provide that

"By such means and to such extent as it shall deem appropriate, the commission shall



keep the public informed as to the operations of organized crime, problems of criminal law enforcement in the State and other activities of the commission."

but section 11 does not require the S.C.I. to make and publicize findings with respect to the guilt of specific individuals and thus does not invite the problem involved in Jenkins. In other words, the S.C.I. can respect the demands of due process without disobeying the letter or the spirit of the statute. Nor does the discretion given by section 12 to hold public hearings in any way mandate an infraction of any constitutional right. Under the statute the S.C.I. may, and under the Constitution it must, work within basic limits.

We add that nothing occurred in the present matter which suggests the S.C.I. intends to transgress those limits. The S.C.I. met the provisions of the Code of Fair Procedure (L. 1968, c. 376), N.J.S.A. 52:13E-1 to 10. A copy of that statute was served upon each appellant with the subpoena, and the subpoena contained a sufficient statement of the subject of the investigation.<sup>2</sup> N.J.S.A. 52:13E-2. The right to have counsel present and to receive his advice, N.J.S.A. 52:13E-3, was re-

2. It read:

"Whether the laws of New Jersey are being faithfully executed and effectively enforced in the City of Long Branch, New Jersey, with particular reference to organized crime and racketeering; whether public officers and public employees in the City of Long Branch and in Monmouth County where it is located, have been properly discharging their duties with particular reference to law enforcement and relations to criminal elements; and whether and to what extent criminal elements have infiltrated the political, economic and business life of those areas."



spected. The hearing was private. There has been no trace of a purpose to deny due process.

In sum, then, we have a typical commission created to discover and to publicize the state of affairs in a criminal area, to the end that helpful legislation may be proposed and receive needed public support. That the commission may also aid law enforcement by gathering evidence of crime and transmitting it to the appropriate agency for evaluation or prosecution does not militate against the power of the Legislature to seek the facts for its own purposes through such a commission. We do not suggest that a commission whose role was solely to aid the executive branch by ferretting out evidence of guilt for transmittal to the executive officers would be barred by the Federal Constitution. No provision of that instrument stands in the way. Nor do we understand appellants to say there is. The federal attack under the present point is based on the due process clause, and the result does not turn upon whether the agency is characterized as "legislative" or "executive" or both. Rather the question is whether the agency, whatever its classic nature in the context of separation of powers, has an accusatory role, and if so, whether individual rights pertinent to an accusatory function have been denied. As to this, the answer is that the role of the S.C.I. is not accusatory and the rights accorded the individuals concerned are appropriate and adequate in the light of the agency's mission and powers.

We add that the United States District Court for the District of New Jersey rejected the same attack in Sinatra v. New Jersey State Commission of Investigation, decided January 9, 1970.

## II.

Appellants contend the statute violates Article III, § 1, which reads:

"The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others; except as expressly provided in this Constitution."

The gist of the complaint seems to be that the statute's division of the power of appointment between the legislative and executive branches offends the provisions of the State Constitution dealing with appointments to office.

Appellants say that if the S.C.I. is a legislative agency, the statute must fall because the power of appointment of two of the commissioners is allocated to the Governor. The power to appoint, as such, is not the special power of any one branch. Ross v. Board of Chosen Freeholders of the County of Essex, 69 N.J.L. 291, 294-296 (E. & A. 1903). The question then is whether there is something in the facts of this case which nonetheless requires the appointments to be made by the Legislature itself. We see no fundamental incongruity within the broad principle of Article III, § 1, quoted above, in permitting the Governor to appoint to a legislative agency. The Governor is a party to the legislative process. He is required to address the Legislature upon "the condition of the State"

and to "recommend such measures as he may deem desirable." Art. V, § I, ¶ 12. All bills must be presented to him for his approval or disapproval. Art. V, § I, ¶ 14. Hence it cannot offend the policy of Art. III, ¶ 1, to authorize the Governor to appoint to a "legislative" commission.

Nor does any constitutional provision dealing with the specific subject of appointments forbid that course. On the contrary, the stated restriction with respect to appointments is upon the legislative branch alone. Art. IV, § V, ¶ 5, provides that "Neither the Legislature nor either house thereof shall elect or appoint any executive, administrative or judicial officer except the State Auditor." See Richman v. Neuberger, 22 N.J. 28 (1956); Richman v. Ligham, 22 N.J. 40 (1956). Hence, if the S.C.I. is a legislative commission within the meaning of our State Constitution, no difficulty resides in the circumstance that the Governor shares the appointing power.

The alternative argument is that the S.C.I. must be deemed to be an executive agency and therefore the Legislature may not appoint because of the affirmative restriction upon a legislative appointment of any executive or administrative officer contained in Art. IV, § V, ¶ 5, referred to above. In contending the S.C.I. is "executive" appellants stress the authority given the S.C.I. by the statutory provisions quoted in Point I to investigate at the request and in aid of the Governor or officers within his branch of government.

The power to investigate reposes in all three branches. Eggers v. Kenny, 15 N.J. 107, 114-115



(1954). And, absent a threat to the essential integrity of the executive branch, see David v. Vesta Co., 45 N.J. 301, 326 (1965), the Legislature may investigate official performance within the executive branch, for it is the responsibility of the Legislature to legislate with respect to executive offices and their powers and duties. This being an appropriate area for legislative inquiry, it is of no significance that Art. V, § IV, ¶ 5, also empowers the Governor to investigate official performance within his department.

A separation-of-powers issue would arise only if the Legislature authorized the S.C.I. to go beyond investigation and to take action which invades an area committed exclusively to another branch. So, for example, if the S.C.I. were empowered to indict or to adjudicate charges of violation of our criminal laws, there would be an encroachment upon the judicial branch, David v. Vesta Co., *supra*, 45 N.J. at 326-327, and if the S.C.I. were authorized itself to prosecute criminal charges, the executive power would be involved. But the S.C.I. does none of this. Its investigations will at most yield material which may also be of interest to executive officials and be referred to them for handling. This being so, the S.C.I. is not vested with authority peculiarly executive in the sense of the separation-of-powers doctrine. Hence it cannot be said that the S.C.I. is an executive agency within the meaning of the provision barring legislative appointments of executive or administrative officers.

Nor does the statute offend Art. IV, § V, ¶ 2, which reads:



"The Legislature may appoint any commission, committee or other body whose main purpose is to aid or assist it in performing its functions. \* \* \*"

This provision appears to focus upon the power of appointment, and authorizes the Legislature to exercise that power if the "main purpose" is to aid or assist that branch of government and inferentially to deny that power if the "main purpose" is to aid or assist another branch.

We must assume the Legislature intended to abide by the Constitution and that the "main purpose" was to aid the legislative branch. That the S.C.I. is directed to investigate at the request of the Governor or agencies within his department does not point the other way. Notwithstanding the executive aid which may ensue, the legislative interest persists, for the legislative power touches all things, subject only to restraints the Constitution imposes. It being within the power of the Legislature to appoint to a commission to inquire into performance in public office, to trace the tentacles of crime in the public and the private sectors, and to inform the Legislature and the public to the end that the sufficiency of existing legislation or the need for remedial measures may be known, the legislative purpose remains dominant notwithstanding that the product of investigations will be available to the executive branch. The separation-of-powers doctrine contemplates that the several branches will cooperate to the end that government will succeed in its mission. It is consistent with the legislative responsibility to provide that a legislative agency shall investigate an area of legitimate legislative interest upon an

executive request or shall alert law enforcement agencies, state and federal, with respect to criminal events it uncovers. Hence the assistance to the executive branch, state and federal, does not dispute the premise that the "main purpose" of the S.C.I. is legislative.

### III.

Appellants contend the immunity provision of the statute violates the Fifth Amendment guarantee that no person "shall be compelled in any criminal case to be a witness against himself."

N.J.S.A. 52:9M-17(b) provides that a person complying with the S.C.I.'s order to answer "shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate." Several objections are raised to the constitutional sufficiency of this immunity.

The first is that the statute does not grant a "transactional" immunity, i.e., from prosecution for the offense to which the compelled testimony relates, but rather grants only a "testimonial" immunity, i.e., protection against the use of the compelled testimony and the fruits thereof leaving the witness subject to trial upon the basis of other evidence the State acquires independently of that testimony. We believe the statute need go no further.

Appellants rely upon Counselman v. Hitchcock, 142 U.S. 547, 35 L. ed. 1110 (1892). There the

statute protected the witness from the use of the evidence obtained from him but did not forbid the use of other evidence to which the witness's testimony might lead. The Court made it plain that the Fifth Amendment would not be satisfied unless the witness were also shielded from the evidence the prosecution uncovered by reason of the leads obtained from the witness, but in its final statement the Court spoke in terms which could be found to be more demanding. It said (142 U.S. at 585-586, 35 L. ed. at 1122):

"We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision; a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. In this respect, we give our assent rather to the doctrine of Emery's Case, in Massachusetts, than to that of People v. Kelly, in New York; and we consider that the ruling of this court in Boyd v. United States, 116 U.S. 616, supports the view we take. Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources



of information which may supply other means of convicting the witness or party."

The last sentence in this quotation observes that the statute did not protect against use of the fruit of the compelled testimony, and thus states a narrower basis for decision than the opening proposition that a statute will not suffice unless it grants an absolute immunity from prosecution.

The application of the self-incrimination clause to a defendant in a criminal proceeding is evident and simple, but the Constitution is read to protect as well a witness in every proceeding, and here difficulties arise. When the private interests of a witness are served by his silence; it is at the expense of litigants who need his testimony or at the expense of the State if the witness thereby withholds what the public needs to know in a judicial or legislative inquiry. Discordant values are involved, and the task is to reconcile their demands.

One approach could be to require the witness to answer and then to shield him from the use of the testimony thus compelled. We did that in a setting in which the good faith of the asserted fear of incrimination could not be tested. State v. De Cola, 33 N.J. 335 (1960). In general, however, the courts chose to permit the witness to refuse to answer, but since, if that right were absolute, the State could be denied evidence it needed for public prosecutions or investigations, the competing values were adjusted by requiring the witness to testify if the State conferred an immunity which would leave him no worse off than if his claim to silence had been allowed. On the



face of things, an immunity against prosecution would exceed what the Fifth Amendment protects, for the Fifth Amendment protects the witness only with respect to what the witness himself can furnish and not from evidence from other sources.

At the time Counselman was decided, the immunity question concerned only the jurisdiction which sought to compel testimony. Counselman dealt with a federal statute and with the restraint the Fifth Amendment imposed upon the federal government. Since then the Fifth Amendment has been found to apply to the States as well, and in addition the view has taken hold that evidence the federal government or a State obtains by forbidden compulsion may not be used by either jurisdiction. In that setting, the scope of the required immunity assumes new significance. If the immunity must protect against prosecution with respect to any offense, both state and federal, to which the testimony relates, the States would be unable to compel testimony no matter how urgent the public need since they could not immunize a witness from federal prosecution. And although the Congress can, in furtherance of federal investigations, bar state prosecutions, still, the State's responsibility and interest in criminal matters being usually more pervasive and demanding, it might be too high a price to pay. See Knapp v. Schweitzer, 357 U.S. 371, 378-379, 2 L. ed. 2d 1393, 1400 (1958). In this new setting, the more acceptable solvent is to protect the witness against the use of his compelled testimony by both jurisdictions but with each remaining free to prosecute on the basis of evidence independently obtained.

The problem was accordingly resolved in those

terms in Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 12 L. ed. 2d 678 (1964). The case involved a New Jersey statute which granted immunity from state prosecution but of course did not purport to protect the witness with respect to federal offenses. On the basis of prior decisions of the United States Supreme Court, we held the statute was valid even though the witness remained subject to federal prosecution. In re Application of Waterfront Commission of N.Y. Harbor, 39 N.J. 436 (1963). The United States Supreme Court agreed that the statute should be upheld, but upon the ground that the witness would indeed be protected in a federal prosecution by virtue of the Fifth Amendment itself. This conclusion had to reject the thesis that the Fifth Amendment required an immunity from prosecution rather than an immunity from the use of the coerced testimony. Indeed, Murphy read Counselman v. Hitchcock to have denounced the statute there involved, not because it failed to provide for immunity against prosecution, but because it did not protect the witness from the use of the fruit of the compelled testimony (387 U.S. at 78-79, 12 L. ed. 2d at 694-695). Murphy concluded in these words (378 U.S. at 79, 12 L. ed. 2d at 695):

\* \* \* \* we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the

interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.

That Murphy rejected the view that the Fifth Amendment requires a grant of immunity from prosecution was emphasized in the concurring opinion of Mr. Justice White (378 U.S. at 93, 12 L. ed. 2d at 703).

In Albertson v. Subversive Activities Control Board, 382 U.S. 70, 15 L. ed. 2d 165 (1965), the Court, in summarizing Counselman v. Hitchcock, did include a reference in Counselman to "absolute immunity against future prosecution for the offence to which the question relates" but this issue was not in focus, and the opinion did not stop there, but rather pointed out that the immunity statute before it did not protect against the use of the compelled statement as evidence in all situations nor against the use of the leads it furnished (382 U.S. at 80, 15 L. ed. 2d at 172). The question whether an immunity against compelled testimony and its fruits is enough was left open in Stevens v. Marks, 383 U.S. 234, 244, 15 L. ed. 2d 724, 732 (1966). But in Gardner v. Broderick, 392 U.S. 273, 20 L. ed. 2d 1082 (1968), the Court said that "Answers may be compelled regardless of the



privilege if there is immunity from federal and state use of the compelled testimony or its fruit in connection with a criminal prosecution against the person testifying," citing both Counselman and Murphy (392 U.S. at 276, 20 L. ed. 2d at 1085). Thus the view of Murphy was reasserted.

We are satisfied that the Fifth Amendment does not require immunity from prosecution. An immunity of that breadth exceeds the protection the Fifth Amendment accords. More importantly, to find that demand in the Fifth Amendment would in practical terms deny state government access to facts it must have to meet its duty to secure the well-being of all the citizens. We heretofore deemed the Constitution to require immunity against use of testimony rather than immunity from prosecution, see State v. Spindel, 24 N.J. 395, 404-405 (1957); and recently our Legislature, in adopting the Model State Witness Immunity Act, substituted an immunity from use for an immunity from prosecution. See In re Addonizio, 53 N.J. 107, 114-115 (1968).

There is a difference in that Murphy dealt with a federal-state setting whereas we are here dealing with the claim that our statute does not protect a witness from prosecution under our state law. But the question in both is the same, i.e., what immunity the Fifth Amendment requires in exchange for compulsion to answer. The values involved are the same. We see no sensible basis for a different answer. Gardner v. Broderick treated the issue as one and the same, citing both Counselman and Murphy. Murphy held and Gardner repeated that the Fifth Amendment requires protection only from the use of the compelled



testimony and the leads it furnishes, and that protection our statute expressly provides. See United States v. McClosky, 273 F. Supp. 604 (S.D.N.Y. 1967); Application of Longo, 280 F. Supp. 185 (S.D.N.Y. 1967).

The remaining questions concerning self-incrimination may be disposed of quickly. It is contended the statutory immunity is inadequate because it does not protect a witness with respect to a prosecution in a sister State or in a foreign land. As to a sister State, it seems clear that if the Fifth Amendment requires protection against the use of the testimony by a sister State, the Amendment itself will provide that protection. Murphy can mean no less. United States v. McClosky, *supra*, 273 F. Supp. at 606; Application of Longo, *supra*, 280 F. Supp. 185; cf. In re Flanagan, 350 F. 2d 746, 747 (D.C. Cir. 1965). As to a foreign land, even if Murphy means that liability under foreign law is now relevant, the danger in the case before us is too imaginary and unsubstantial to sustain a refusal to answer. See Murphy, 378 U.S. at 67-68, 12 L. ed. 2d at 688.

Nor do we see substance to the complaint that our statute protects the witness only with respect to "responsive" answers or evidence. The limitation is intended to prevent a witness from seeking undue protection by volunteering what the State already knows or will likely come upon without the witness's aid. The purpose is not to trap. Fairly construed, the statute protects the witness against answers and evidence he in good faith believed were demanded.

## IV.

The orders under review provide that appellants shall be incarcerated until they answer the questions they refused to answer. Appellants contend the statute authorizes only a penal prosecution for contempt of the Commission, for which a fixed sentence must be imposed.

With reference to "contempt" of court, we have tried to distinguish sharply between (1) the public offense, i.e., "contempt," for which the court may punish the offender and (2) the injured litigant's right to apply for relief to satisfy his private claim arising out of the same offending act or omission. New Jersey Department of Health v. Roselle, 34 N.J. 331 (1961); In re Application of Waterfront Comm. of N.Y. Harbor, *supra*, 39 N.J. at 466; In re Carton, 48 N.J. 9, 19-24 (1966); In re Buehrer, 50 N.J. 501, 515-516 (1967). The procedure and rights of the person concerned depend very much upon the purpose of the proceeding, and hence our rule of court prescribes the processes carefully to the end that he may know at once whether he is to meet a penal charge or the civil claim of a litigant, and may be afforded the rights appropriate to the proceeding. R. 1:10-1 to 5.

It would be helpful if legislative draftsmen abided by our semantics, but we cannot insist that they shall. Our responsibility remains to find and enforce the legislative intent.

N.J.S.A. 52:9M-17b provides that a person given immunity "may nevertheless be prosecuted for any perjury committed in such answer or in producing such evidence, or for contempt for failing to give

an answer or produce evidence in accordance with the order of the Commission. \* \* \*," Appellants insist this language contemplates a penal prosecution and nothing else. But the sense of the situation goes strongly against that limitation, for the mission of the S.C.I. is to obtain facts for the Legislature and the mere punishment of a recalcitrant witness would not achieve that end.

We can think of no reason why the Legislature would want to permit a witness to block the inquiry if he is willing to accept a penalty. Mindful, as we are, that the expression "prosecution for contempt" has been used widely to describe a proceeding arising out of contumacy, whether the object of the proceeding is to compel compliance or to punish for noncompliance or both, we must seek the legislative design in that light, notwithstanding that the terms employed are not the ones we prefer. Here we have no doubt that the Legislature intended the S.C.I. to obtain the facts, whatever the wish of the person subpoenaed. The very provision for a grant of immunity repels the notion that a witness may choose to be silent for a price.

Nor is it critical whether the statutory language fits snugly within our rule of court relating to judicial proceedings in aid of subpoenas of a public officer or agency. R, 1:9-6. Subsection (a) deals with ex parte applications for compliance, subsection (b) with applications for compliance made on notice, and (c) with applications to "punish" where a statute authorizes that course. These provisions were intended to reflect statutory provisions of which the draftsmen of the rule were aware. Needless to say, the rule does not



mean that the judiciary will withhold its hand unless the statute falls within the language of the rule. R. 1:1-2 provides that "In the absence of rule, the court may proceed in any manner compatible" with the purpose "to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Here appellants were plainly informed that the objective of the proceedings was to have them jailed until they complied with the order of the S.C.I. There can be and there is no complaint on that score.

We should add some further observations. The section of the statute here involved deals with defiance of the order of the S.C.I. itself rather than with defiance of an order obtained by the agency from a court. We see no difficulty in the circumstance that the statute does not call for an intermediate order by a court to be followed by enforcement of the court's mandate, but we point out that the absence of such an intermediate step does not deny a witness the opportunity to have the court pass upon the validity of the agency's order to answer. There was no misunderstanding here in that regard. Appellants were heard fully upon the propriety of the questions. They do challenge the validity of certain questions but there is no charge that the hearing before the trial court upon those objections was inadequate.

## V.

The remaining issues warrant little more than mention.

Zicarelli and Occhipinti charge that the ques-



tions put to them offended their freedom of association guaranteed by the First Amendment. Sweezy v. New Hampshire, 354 U.S. 234, 1 L. ed. 2d 1311 (1957), which they cite, dealt with a legislative inquiry into political associations. Here the questions relate to an allegedly massive criminal organization, and to the witness's associations in that context. The subject matter is incontestably criminal and the interest of the State is manifest. We see no affront to the values protected by the First Amendment.

Appellants complain that the questions "sought to probe into the most secret recesses of the witness' minds and to expose these private thoughts to public view," and this they say is barred by the Fourth Amendment, alone or in conjunction with the First and Fifth Amendments. Granted the right of the Legislature to inquire, the pertinency of the questions and the sufficiency of the immunity with respect to self-incrimination, all of which must be accepted for the immediate purpose, the proposition advanced, simply stated, is that the Constitution prohibits a subpoena to a mere witness. It is plainly frivolous.

Appellants' reliance upon the Sixth Amendment appears to raise no issue beyond the due process question discussed in "I" above.

Their further claim that if the statute is valid, it nonetheless has been so applied or implemented as to violate the Constitution has no basis.

The trial court properly refused to permit an examination of the Executive Director of the S.C.I. as to whether the agency already had the informa-

tion it sought from appellants or whether the S.C.I. was following a path revealed by illegal wire-taps or bugging. As to the first, it would be an unwarranted interference with the legislative branch thus to superintend its exercise of its constitutional authority to investigate. It is difficult to conceive of a showing which would justify that course. Surely nothing before us suggests a serious issue in that regard.

With respect to the effort to learn whether evidence illegally obtained prompted the legislative investigation or the questions put to appellants, they cite no authority for the extraordinary proposition that such illegality will taint the legislative process. The suppression of the truth because it was discovered by a violation of a constitutional guarantee is a judge-made sanction to deter insolence in office. It is invoked in penal proceedings, and then only at the behest of a defendant whose right was violated. Farley v. \$168,400.97, 55 N.J. 31, 47 (1969). Even there, the wisdom of a suppression of the truth is not universally acknowledged. Farley, supra, 55 N.J. at 50. Appellants ask us to go further, and to suppress the truth on behalf of a mere witness, to the end that he may choose to be silent. Still more, appellants ask that we visit the sanction upon the legislative process, even though that process cannot result in a judgment against them. Pressed relentlessly and without regard to all other values, the sanction thesis could indeed deny the Legislature access to facts, and even taint a statute adopted in response to facts illegally revealed, but we think such an extension would be absurd.

Finally, Russo asserts the questions put to him

are improper because they allegedly enter an area in which he has been convicted of perjury. The conviction, as described in his brief, was for perjury in denying to a grand jury that he had said to a policeman that he, Russo, had the Mayor and some councilmen of the City of Long Branch "in his pocket." We do not see a problem. His testimony before the S.C.I. could not be used in a retrial of that perjury charge. Nor do the questions here involved include the one which led to the conviction, so as to raise the prospect that if Russo repeats his former testimony he will be indicted on a fresh charge of perjury. We need not anticipate issues such an indictment might raise.

The orders are affirmed.

(Stamped A TRUE COPY)  
John H. Gildea, Clerk



## Appendix B

## Chapter 9 M. State Commission of Investigation

[New]

Sec.

- 52:9M-1. Creation of commission; membership; compensation; vacancies.
- 52:9M-2. Duties and powers.
- 52:9M-3. Investigation of public officers.
- 52:9M-4. Investigation of departments or agencies.
- 52:9M-5. Cooperation with law enforcement officials.
- 52:9M-6. Investigations of federal law violations.
- 52:9M-7. Law enforcement problems extending into other states.
- 52:9M-8. Referral of evidence of officers crime or misconduct to officials for prosecution or removal.
- 52:9M-9. Employment of personnel; duties; compensation.
- 52:9M-10. Annual report; recommendations; interim reports.
- 52:9M-11. Informing public of commissions activities.
- 52:9M-12. Authority of commission.
- 52:9M-13. Construction of sections 2 through 12 of act.
- 52:9M-14. Cooperation and assistance of state departments and agencies.
- 52:9M-15. Disclosure of name of witness or information.
- 52:9M-16. Exhibits; impounding by court.
- 52:9M-17. Immunity to criminal prosecution or penalty.
- 52:9M-18. Partial invalidity.



L.1968, c. 266, effective until December 31, 1974, see note under § 52:9M-1.

**52:9M-1      STATE GOVERNMENT**

**52:9M-1. Creation of commission; membership; compensation; vacancies**

There is hereby created a temporary State Commission of Investigation. The Commission shall consist of 4 members, to be known as commissioners.

Two members of the commission shall be appointed by the Governor, one by the President of the Senate and one by the Speaker of the General Assembly, each for 5 years. The Governor shall designate one of his appointees to serve as chairman of the commission.

The members of the commission appointed by the President of the Senate and the Speaker of the General Assembly and at least one of the members appointed by the Governor shall be attorneys admitted to the bar of this State. No member or employee of the commission shall hold any other public office or public employment. Not more than 2 of the members shall belong to the same political party.

Each member of the commission shall receive an annual salary of \$15,000.00 and shall also be entitled to reimbursement for his expenses actually and necessarily incurred in the performance of his duties, including expenses of travel outside of the State.

Vacancies in the commission shall be filled

for the unexpired term in the same manner as original appointments. A vacancy in the commission shall not impair the right of the remaining members to exercise all the powers of the commission.

L.1968, c. 266, § 1, eff. Sept. 4, 1968.

**Duration of Act:**

Section 20 of L.1968, c. 266, provided: "This act shall take effect immediately and remain in effect until December 31, 1974."

**Title of Act:**

An Act creating a temporary State Commission of Investigation; prescribing its functions, powers and duties; making an appropriation therefor. L. 1968, c. 266.

**52:9M-2. Duties and powers**

The commission shall have the duty and power to conduct investigations in connection with:

a. The faithful execution and effective enforcement of the laws of the State, with particular reference but not limited to organized crime and racketeering;

b. The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

c. Any matter concerning the public peace, public safety and public justice.

L.1968, c. 266, § 2, eff. Sept. 4, 1968.

**52:9M-3. Investigation of public officers**

At the direction of the Governor or by concurrent resolution of the Legislature the commission shall conduct investigations and otherwise assist in connection with:

a. The removal of public officers by the Governor;

b. The making of recommendations by the Governor to any other person or body, with respect to the removal of public officers;

c. The making of recommendations by the Governor to the Legislature with respect to changes in or additions to existing provisions of law required for the more effective enforcement of the law.

L.1968, c. 266, § 3, eff. Sept. 4, 1968.

**52:9M-4. Investigation of departments or agencies**

At the direction or request of the Legislature by concurrent resolution or of the Governor or of the head of any department, board, bureau, commission, authority or other agency created by the State, or to which the State is a party, the commission shall investigate the management or affairs of any such department, board, bureau, commission, authority or other agency.

L.1968, c. 266, § 4, eff. Sept. 4, 1968.

52:9M-5. Cooperation with law enforcement officials

Upon request of the Attorney General, a county prosecutor or any other law enforcement official, the commission shall co-operate with, advise and assist them in the performance of their official powers and duties.

L.1968, c. 266, § 5, eff. Sept. 4, 1968.

52:9M-6. Investigations of federal law violations

The commission shall co-operate with departments and officers of the United States Government in the investigation of violations of the Federal laws within this State.

L.1968, c. 266, § 6, eff. Sept. 4, 1968.

52:9M-7. Law enforcement problems extending into other states

The commission shall examine into matters relating to law enforcement extending across the boundaries of the State into other States; and may consult and exchange information with officers and agencies of other States with respect to law enforcement problems of mutual concern to this and other States.

L.1968, c. 266, § 7, eff. Sept. 4, 1968.

52:9M-8. Referral of evidence of officers crime or misconduct to officials for prosecution or removal



Whenever it shall appear to the commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the commission shall refer the evidence of such crime or misconduct to the officials authorized to conduct the prosecution or to remove the public officer.

L.1968, c.266, § 8, eff. Sept. 4, 1968.

52:9M-9. Employment of personnel; duties; compensation

The commission shall be authorized to appoint and employ and at pleasure remove an executive director, counsel, investigators, accountants, and such other persons as it may deem necessary, without regard to civil service; and to determine their duties and fix their salaries or compensation within the amounts appropriated therefor. Investigators and accountants appointed by the commission shall be and have all the powers of peace officers.

L.1968, c. 266, § 9, eff. Sept. 4, 1968.

52:9M-10. Annual report; recommendations; interim reports

The commission shall make an annual report to the Governor and Legislature which shall include its recommendations. The commission shall make such further interim reports to the Governor and Legislature, or either thereof, as it shall deem advisable, or as shall be required by the Governor or by concurrent resolution of the Legislature.

L.1968, c. 266, § 10, eff. Sept. 4, 1968.

**52:9M-11. Informing public of commissions activities**

By such means and to such extent as it shall deem appropriate, the commission shall keep the public informed as to the operations of organized crime, problems of criminal law enforcement in the State and other activities of the commission.

L.1968, c. 266, § 11, eff. Sept. 4, 1968.

**52:9M-12. Authority of commission**

With respect to the performance of its functions, duties and powers and subject to the limitation contained in paragraph d of this section, the commission shall be authorized as follows:

a. To conduct any investigation authorized by this act at any place within the State; and to maintain offices, hold meetings and function at any place within the State as it may deem necessary;

b. To conduct private and public hearings, and to designate a member of the commission to preside over any such hearing;

c. To administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation, and require the production of any books, records, documents or other evidence it may deem relevant or material to an investigation; and the commission may desig-

nate any of its members or any member of its staff to exercise any such powers;

d. Unless otherwise instructed by a resolution adopted by a majority of the members of the commission, every witness attending before the commission shall be examined privately and the commission shall not make public the particulars of such examination. The commission shall not have the power to take testimony at a private hearing or at a public hearing unless at least 2 of its members are present at such hearing;

e. Witnesses summoned to appear before the commission shall be entitled to receive the same fees and mileage as persons summoned to testify in the courts of the State.

If any person subpoenaed pursuant to this section shall neglect or refuse to obey the command of the subpoena, any judge of the Superior Court or of a County Court or any municipal magistrate may, on proof by affidavit of service of the subpoena, payment or tender of the fees required and of refusal or neglect by the person to obey the command of the subpoena, issue a warrant for the arrest of said person to bring him before the judge or magistrate, who is authorized to proceed against such person as for a contempt of court.

L.1968, c. 266, § 12, eff. Sept. 4, 1968. Amended by L.1969, c. 67, § 1, eff. May 28, 1969.

52:9M-13. Construction of sections 2 through 12 of act



Nothing contained in sections 2 through 12 of this act shall be construed to supersede, repeal or limit any power, duty or function of the Governor or any department or agency of the State, or any political subdivision thereof, as prescribed or defined by law.

L.1968, c. 266, § 13, eff. Sept. 4, 1968. Amended by L.1969, c. 67, eff. May 28, 1969.

**52:9M-14. Cooperation and assistance of state departments and agencies**

The commission may request and shall receive from every department, division, board, bureau, commission, authority or other agency created by the State, or to which the State is a party, or of any political subdivision thereof, co-operation and assistance in the performance of its duties.

L.1968, c. 266, § 14, eff. Sept. 4, 1968.

**52:9M-15. Disclosure of name of witness or information**

Any person conducting or participating in any examination or investigation who shall disclose to any person other than the commission or an officer having the power to appoint one or more of the commissioners the name of any witness examined, or any information obtained or given upon such examination or investigation, except as directed by the Governor or commission, shall be adjudged a disorderly person.

Any statement made by a member of the commission or an employee thereof relevant to any



proceedings before or investigative activities of the commission shall be absolutely privileged and such privilege shall be a complete defense to any action for libel or slander.

L.1968, c. 266, § 15, eff. Sept. 4, 1968. Amended by L.1969, c. 67, § 3, eff. May 28, 1969.

52:9M-16. Exhibits; Impounding by court

Upon the application of the commission, or a duly authorized member of its staff, the Superior Court or a judge thereof may impound any exhibit marked in evidence in any public or private hearing held in connection with an investigation conducted by the commission, and may order such exhibit to be retained by, or delivered to and placed in the custody of, the commission. When so impounded such exhibit shall not be taken from the custody of the commission, except upon further order of the court made upon 5 days' notice to the commission or upon its application or with its consent.

L.1968, c. 266, § 16, eff. Sept. 4, 1968.

52:9M-17. Immunity to criminal prosecution or penalty

a. If, in the course of any investigation or hearing conducted by the commission pursuant to this act, a person refuses to answer a question or questions or produce evidence of any kind on the ground that he will be exposed to criminal prosecution or penalty or to a forfeiture of his estate thereby, the commission may order the person to answer the question or questions or produce the requested evidence and confer immunity as in

this section provided. No order to answer or produce evidence with immunity shall be made except by resolution of a majority of all the members of the commission and after the Attorney General and the appropriate county prosecutor shall have been given at least 24 hours written notice of the commission's intention to issue each order and afforded an opportunity to be heard in respect to any objections they or either of them may have to the granting of immunity.

b. If upon issuance of such an order, the person complies therewith, he shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate, except that such person may nevertheless be prosecuted for any perjury committed in such answer or in producing such evidence, or for contempt for failing to give an answer or produce evidence in accordance with the order of the commission; and any such answer given or evidence produced shall be admissible against him upon any criminal investigation, proceeding or trial against him for such perjury, or upon any investigation, proceeding or trial against him for such contempt.

L.1968, c. 266, § 17, eff. Sept. 4, 1968.

#### 52:9M-18. Partial invalidity

If any section, clause or portion of this act shall be unconstitutional or be ineffective in whole or in part, to the extent that it is not unconstitutional or ineffective it shall be valid and effective.

and no other section, clause or provision shall on account thereof be deemed invalid or ineffective.

L.1968, c. 266, § 18, eff. Sept. 4, 1968.

## **CHAPTER 13E. INVESTIGATING AGENCIES, CODE OF FAIR PROCEDURE [NEW]**

### **Sec.**

- 52:13E-1. Definitions.**
- 52:13E-2. Personal service.**
- 52:13E-3. Right to counsel; submission of proposed questions.**
- 52:13E-4. Records of public hearings; copies.**
- 52:13E-5. Sworn statement by witness; incorporation in the record.**
- 52:13E-6. Persons affected by proceedings; appearance or statement of facts.**
- 52:13E-7. Rights or privileges granted by agencies.**
- 52:13E-8. Dissemination of evidence adduced at private hearing.**
- 52:13E-9. Hearing conducted by temporary state commission.**
- 52:13E-10. Right of members to file statement of minority views.**

### **52:13E-1. Definitions**

**As used in this act:**

(a) "Agency" means any of the following while engaged in an investigation or inquiry: (1) the Governor or any person or persons appointed by him, acting pursuant to P.L. 1941, c. 16, s. 1



(C. 52:15-7), (2) any temporary State commission or duly authorized committee thereof having the power to require testimony or the production of evidence by subpoena, or (3) any legislative committee or commission having the powers set forth in Revised Statutes 52:13-1.

(b) "Hearing" means any hearing in the course of an investigatory proceeding (other than a preliminary conference or interview at which no testimony is taken under oath) conducted before an agency at which testimony or the production of other evidence may be compelled by subpoena or other compulsory process.

(c) "Public hearing" means any hearing open to the public, or any hearing, or such part thereof, as to which testimony or other evidence is made available or disseminated to the public by the agency.

(d) "Private hearing" means any hearing other than a public hearing.

L.1968, c. 376, § 1, eff. Dec. 27, 1968.

#### Title of Act:

An Act establishing a code of fair procedure to govern State investigating agencies and providing a penalty for certain violations thereof. L.1968, c. 376.

#### Library references

Administrative Law and Procedure  
(key) 341 et seq.



States (key) 34, 39 1/2, 43, 66 et seq.

C.J.S. Public Administrative Bodies and Procedure  
§ 78.

C.J.S. States §§ 42, 42 et seq., 45-47, 58 et seq.,  
81.

Words and Phrases (Perm. Ed.)

#### 52:13E-2. Personal service

No person may be required to appear at a hearing or to testify at a hearing unless there has been personally served upon him prior to the time when he is required to appear, a copy of this act, and a general statement of the subject of the investigation. A copy of the resolution, statute, order or other provision of law authorizing the investigation shall be furnished by the agency upon request therefor by the person summonsed.

L.1968, c. 376, § 2, eff. Dec. 27, 1968.

#### 52:13E-3. Right to counsel; submission of proposed questions

A witness summoned to a hearing shall have the right to be accompanied by counsel, who shall be permitted to advise the witness of his rights, subject to reasonable limitations to prevent obstruction of or interference with the orderly conduct of the hearing. Counsel for any witness who testifies at a public hearing may submit proposed questions to be asked of the witness relevant to the matters upon which the witness has been questioned and the agency shall ask the witness such of the questions as it may deem appropriate to its inquiry.

L.1968, c. 376, § 3, eff. Dec. 27, 1968.

**52:13E-4. Records of public hearings; copies**

A complete and accurate record shall be kept of each public hearing and a witness shall be entitled to receive a copy of his testimony at such hearing at his own expense. Where testimony which a witness has given at a private hearing becomes relevant in a criminal proceeding in which the witness is a defendant, or in any subsequent hearing in which the witness is summoned to testify, the witness shall be entitled to a copy of such testimony, at his own expense, provided the same is available, and provided further that the furnishing of such copy will not prejudice the public safety or security.

L.1968, c. 376, § 4, eff. Dec. 27, 1968.

**52:13E-5. Sworn statement by witness; Incorporation in the record**

A witness who testifies at any hearing shall have the right at the conclusion of his examination to file a brief sworn statement relevant to his testimony for incorporation in the record of the investigatory proceeding.

L.1968, c. 376, § 5, eff. Dec. 27, 1968.

**52:13E-6. Persons affected by proceedings; appearance or statement of facts**

Any person whose name is mentioned or who is specifically identified and who believes that testi-

mony or other evidence given at a public hearing or comment made by any member of the agency or its counsel at such a hearing tends to defame him or otherwise adversely affect his reputation shall have the right, either to appear personally before the agency and testify in his own behalf as to matters relevant to the testimony or other evidence complained of, or in the alternative at the option of the agency, to file a statement of facts under oath relating solely to matters relevant to the testimony or other evidence complained of, which statement shall be incorporated in the record of the investigatory proceeding.

L.1968, c. 375, § 6, eff. Dec. 27, 1968.

52:13E-7. Rights or privileges granted by agencies

Nothing in this act shall be construed to prevent an agency from granting to witnesses appearing before it, or to persons who claim to be adversely affected by testimony or other evidence adduced before it, such further rights and privileges as it may determine.

L.1968, c. 376, § 7, eff. Dec. 27, 1968.

52:13E-8, Dissemination of evidence adduced at private hearing

Except in the course of subsequent hearing which is open to the public, no testimony or other evidence adduced at a private hearing or preliminary conference or interview conducted before a single-member agency in the course of its investigation shall be disseminated or made avail-

able to the public by said agency, its counsel or employees without the approval of the head of the agency. Except in the course of a subsequent hearing open to the public, no testimony or other evidence adduced at a private hearing or preliminary conference or interview before a committee or other multi-member investigating agency shall be disseminated or made available to the public by any member of the agency, its counsel or employees, except with the approval of a majority of the members of such agency. Any person who violates the provisions of this subdivision shall be adjudged a disorderly person.

L.1968, c. 376, § 8, eff. Dec. 27, 1968.

52:13E-9. Hearing conducted by temporary state commission

No temporary State commission having more than 2 members shall have the power to take testimony at a public or private hearing unless at least 2 of its members are present at such hearing.

L.1968, c. 376, § 9, eff. Dec. 27, 1968.

52:13E-10. Right of members to file statement of minority views

Nothing in this act shall be construed to affect, diminish or impair the right, under any other provision of law, rule or custom, of any member or group of members of a committee or other multi-member investigating agency to file a statement or statements of minority views to accompany and be released with or subsequent to the report of the committee or agency.

L.1968, c. 376, § 10, eff. Dec. 27, 1968.



**MAR 12 1970**

**JOHN F. DAVIS, CLERK**

**IN THE**

**Supreme Court of the United States**

**No.**  ~~73~~ **69-4**

**JOSEPH ARTHUR ZICARELLI,**

*Appellant,*

*v.*

**NEW JERSEY STATE COMMISSION OF  
INVESTIGATION,**

*Appellee.*

**On Appeal From the Supreme Court of the State of  
New Jersey**

**MOTION TO DISMISS AND BRIEF IN SUPPORT  
THEREOF**

**NEW JERSEY STATE COMMISSION OF  
INVESTIGATION,  
329 West State Street,  
Trouton, New Jersey, 08618.**

**WILBUR H. MATHESIUS,  
KENNETH P. ZAUBER,  
Of Counsel and  
on the Brief.**

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# Supreme Court of the United States

No.

JOSEPH ARTHUR ZICARELLI,

*Appellant,*

*v.*

NEW JERSEY STATE COMMISSION OF  
INVESTIGATION,

*Appellee.*

On Appeal From the Supreme Court of the State of  
New Jersey

## MOTION TO DISMISS

Pursuant to Rule 16(b) of this Court, Appellee, the New Jersey State Commission of Investigation (hereinafter, "the Commission"), moves to dismiss this appeal on the ground that it does not present a substantial federal question:

### Statement

The Commission respectfully directs this Court's attention to the following facts which supplement Appellant Zicarelli's statement:



Appellant Zicarelli filed a suit in July, 1969, in the United States District Court for the District of New Jersey, against the Commission. His complaint in that case explicitly raised the identical issues as are raised in Points 1, 2, 3 and 4 of his Jurisdictional Statement in the instant case. He demanded that the Commission be declared unconstitutional pursuant to the provisions of the Federal Declaratory Judgment Act, that the Immunity Provision in particular be adjudged unconstitutional, that an injunction issue restraining the enforcement, or invoking of the Immunity Provision and that a three-judge court be convened to hear and determine the cause. On July 19, 1969, Chief Judge William H. Hastie of the Third Circuit Court of Appeals filed a memorandum and order denying the convening of a statutory court, finding "in the present formal challenges to the constitutionality of the New Jersey statute no such substantiality as would warrant convening statutory courts" (R1a-R3a).<sup>\*</sup> Subsequently, Appellant Zicarelli moved for summary judgment before the Honorable James A. Coolahan, U.S.D.C. On July 29, 1969, Judge Coolahan rendered an opinion upholding the constitutionality of the entire statutory scheme creating the Commission and further upholding specifically the constitutionality of the Immunity Provision. He granted summary judgment to the Commission and dismissed the complaint (R4a-R15a). Appellant Zicarelli filed a Notice of Appeal to the Third Circuit Court of Appeals, but subsequently withdrew this appeal (R16a).

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<sup>\*</sup> References are to the page numbers in the Commission's Appendix filed with the Supreme Court of New Jersey, which has been certified to this Court as a part of the record below.

## ARGUMENT

**The appellant has not presented a substantial constitutional issue entitling him to appeal.**

1. The Fifth Amendment of the United States Constitution, as it pertains to Appellant's argument relating to self-incrimination, provides simply that no person "... shall be compelled in any criminal case to be a witness against himself . . ." In complete harmony with the Amendment, N.J.S.A. 52:9M-17(b) (the immunity section of the statute creating the Commission) prohibits the use of a witness's testimony or evidence gained therefrom after immunity has been properly conferred upon that witness. The statute relates in pertinent part that such a witness "... shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate." Appellant claims that such a grant of immunity is insufficient to supplant the Fifth Amendment privilege and that *Counselman v. Hitchcock*, 142 U. S. 547 (1892) purportedly requires an "absolute immunity against further prosecution" notwithstanding an independent source of evidence for that prosecution, thereby rendering the New Jersey Act constitutionally deficient. It is submitted that the grant of immunity under N.J.S.A. 52:9M-17(b) is in complete accord with the privilege and with the decisions of this Court and, therefore, fails to present a substantial question which this Court should consider.

Significantly, in a prior federal action by this Appellant, attacking the constitutionality of the Commission's immunity provision, Chief Judge Hastie of the Third Circuit Court of Appeals specifically found the challenge not

even substantial enough to warrant the convening of a three-judge court (R1a-R3a).

The decisions of this Court relating to the Fifth Amendment privilege and the immunity question may be synthesized into one overriding precept: that a grant of immunity must be co-extensive with the privilege against self-incrimination which it seeks to displace. This maxim has remained in substance since its reiteration in *Counselman, supra*. However, that there is a permissible latitude extant between the so-called "absolute" form of immunity from *any future prosecution* recited as a gratuitous overage in *Counselman* at 586 and an overly-attenuated immunity which is not co-extensive with the displaced privilege, is evident and at least tacitly acknowledged by this Court. Thus, the sufficiency of a prohibition against the use of a witness's testimony or evidence derived therefrom is indicated in the concurring opinion of Mr. Justice White in *Murphy v. Waterfront Commission of New York Harbor*, 378 U. S. 52 (1964) at 107:

"Immunity must be as broad as but not *harmfully and wastefully broader* than the privilege against self-incrimination." (Emphasis added.)

Moreover, in writing for the majority in *Murphy*, Mr. Justice Goldberg stated that:

"... we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate

the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." 378 U. S. at 79.

If "absolute" immunity is the extreme, then the prohibition against the use of compelled testimony and evidence is the logical derivative reference of Justices White and Goldberg.

It is evident from the reported opinions that this Court has found no grave difficulty in reconciling the so-called "testimonial" immunity statutes, prohibiting the use of compelled testimony or evidence derived therefrom, with the Fifth Amendment, despite the 78 year old *Counselman* decision. In *Gardner v. Broderick*, 392 U. S. 273 (1968), Mr. Justice Fortas, citing *Counselman*, stated, in the clearest of terms at p. 276 that:

"Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying."

*Gardner, supra*, is silent as to any "absolute" bar to future prosecution. See also *Ullman v. United States*, 350 U. S. 442 at 506 (1956). Inasmuch as a prohibition against use of compelled testimony and its "fruits" obvi-



ously comports with the requirements of the Fifth Amendment, it is submitted that the question is not substantial and should not be considered by this Court.

2. Appellant Zicarelli urges that a substantial question is raised due to the fact that a "responsive" answer is required as a pre-condition to the grant of immunity, thereby imposing an unconstitutional qualification thereon. In the first instance, such a claim is clearly premature. The fact that a court may ultimately have to determine whether or not an answer is responsive does not render a statute compelling such an answer unconstitutional. Analogously, a similar determination must often be made with respect to the "pertinency" of questions. Cf. *Morss v. Forbes*, 24 N. J. 341 at 352-353 and 356-357 (1957).

Furthermore, as a common sense proposition, it is apparent that a witness could not claim, nor would he receive or require, immunity from a nonsensical or absurd answer. In any event, notwithstanding the inclusion or elimination of the word "responsive" from the statute in question, similar legal questions would arise which would require some subsequent judicial determination for final resolution. Such *in futura* questions are insubstantial and should not be considered by this Court. Again, Appellant explicitly raised this issue in his federal action in July, 1969, and Chief Judge Hastie found that it lacked the requisite substantiality for even convening a three-judge court (R1a-R3a).

3. Appellant Zicarelli has been characterized by his own counsel as an "internationalist in crime" (see Jurisdictional Statement of Appellant, p. 8). By virtue of this appellation, he suggests that no immunity granted by the State of New Jersey would rise to sufficient height to accord him his constitutional protections. The Court

below at page 21 found the danger of prosecution "too imaginary and unsubstantial to sustain a refusal to answer".

"It is respectfully submitted that Appellant must go much further in demonstrating a "real danger of prosecution in a foreign country" as described in *Murphy v. Waterfront Commission of New York Harbor*, 378 U. S. 52 at 67 (1964), than merely being labeled an "internationalist in crime" by his counsel to invoke the consideration of this Court. "The privilege protects against real dangers, not remote and speculative possibilities." *Murphy, supra*, at 102. See also *Brown v. Walker*, 161 U. S. 591 at 599-600 (1896). Accordingly, it is respectfully suggested that no substantial constitutional question is raised by the fact that Appellant may be considered by some as an "internationalist in crime".

4. Appellant attempts to equate the Commission and the statute creating it with the Louisiana Commission in *Jenkins v. McKeithen*, 395 U. S. 411 (1969). His claim of unconstitutionality based on this comparison is not substantial enough to require plenary argument.

Firstly, this Court did not hold that the Louisiana Commission's procedures were unconstitutional in *Jenkins*. It was held only that there was enough latent in the complaint that the case should proceed to trial. This holding was based on the requirement in the Louisiana statute that there be a determination in public findings whether there is probable cause to believe violations of criminal law have occurred, which public findings could include conclusions as to specific individuals. It was felt by the plurality that there was enough to warrant a hearing on the allegations in the complaint. The plurality further stressed that the Louisiana Commission had no role whatever in the Legislative process.

The infirmities in the Louisiana Commission and its procedures are conspicuously absent with respect to the Commission in the case at bar. N.J.S.A. 52:9M-3 and N.J.S.A. 52:9M-10 make the role of the Commission in the Legislative process clear. The directive in the statute in *Jenkins* that the Louisiana Commission name individuals guilty of specific crimes cannot be found even by inference in the New Jersey statute. Further, Appellant Zicarelli was given an opportunity to prove at trial that the Commission is designed to and does act in an accusatory manner and that its procedures fail to meet the requirements of due process. It was specifically found that the role of the Commission is *not* accusatory, that the rights accorded an individual are appropriate and adequate in the light of the Commission's mission and powers, that nothing had occurred in the instant matter which suggested that the Commission intends to transgress basic constitutional limits and that there has not been even a trace of a purpose to deny due process (see Opinion below, pages 5-8).

The New Jersey Supreme Court's construction of the statute creating the Commission, with respect to its legislative mission and its purpose "to find facts which may subsequently be used as the basis for legislative and executive action" (see Opinion below, page 5), which construction resulted from a review of the statute, must be accepted. *Kingsley Int. Pic. Corp. v. Regents of N.Y.U.*, 360 U. S. 684 (1959).

Those provisions of the statute in the instant case on which Appellant relies in an effort to show that the Commission is accusatory fall far short of that goal. The mandates in N.J.S.A. 52:9M-5, 52:9M-6 and 52:9M-7 to assist law enforcement officials, to cooperate with the United States Government in its investigations in New

Jersey and to consult and exchange information with other states with respect to law enforcement, in no way detract from the Commission's investigatory character. The directive in N.J.S.A. 52:9M-8 to refer evidence of crime to a proper prosecutive authority is no more than the obligation of any citizen (the referral obviously cannot be done publicly). As the New Jersey Supreme Court said at page 8 of its opinion: "That the Commission may also aid law enforcement by gathering evidence of crime and transmitting it to the appropriate agency for evaluation or prosecution does not militate against the power of the Legislature to seek the facts for its own purposes through such a Commission". The wiretapping authority under a different statute (2A:156A-8), with attendant judicial safeguards, is merely an additional method for acquiring knowledge. Appellant's allusion to the fact that counsel to the Commission (and its Executive Director) are former Assistant United States Attorneys, in an effort to bolster his assertion that the Commission is prosecutorial, is not even worthy of response.

Finally, it is significant that ten judges (including the Chief Judge of the Third Circuit Court of Appeals, a United States District Court Judge, a New Jersey Superior Court Judge and seven New Jersey Supreme Court Justices) have reviewed the New Jersey statute specifically in light of the *Jenkins* case and have found the Commission to be investigatory rather than accusatory, and thus within the holding in *Hannah v. Larche*, 363 U. S. 420 (1960). It is respectfully urged that the decision below is so clearly correct as not to require plenary consideration by this Court.

5. Appellant's argument that a civil commitment is violative of the Eighth Amendment is specious. A coercive



imprisonment for civil contempt based upon refusal to answer questions is clearly valid. *Shillitani v. United States*, 384 U. S. 364 (1966). Obviously, a recalcitrant witness cannot be confined, under the language in *Shillitani*, beyond the life of the Commission (until December 31, 1974). There is no punishment involved whatsoever, let alone cruel and unusual, when a witness "carries the keys to prison in his own pocket." Appellant's inference that he will be steadfast in his refusal to answer and that his incarceration is thus tantamount to life imprisonment (at page 5 of his Jurisdictional Statement) is impertinent, even though it is not nearly as arrogantly dogmatic as his outright assertion in the New Jersey Supreme Court that he would never answer the questions (see page 74 of Appellant's brief in the Supreme Court of New Jersey, certified to this Court as a part of the record below).

If Appellant chooses to remain incarcerated rather than obeying the lawful command to answer, the only punishment is a self-imposed, masochistic one. As this Court said in *Shillitani*:

"While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify." 384 U. S. at p. 370.

Since Appellant's release is conditioned upon his willingness to testify, the Eighth Amendment argument is frivolous.

6. Appellant's argument that inquiry into his associations or beliefs with respect to La Cosa Nostra is violative of his First Amendment right of freedom of association is not substantial enough to require plenary con-

sideration, in view of the obvious correct finding below that the questions asked relate to an allegedly massive criminal organization and that the interest of the State is manifest. The Court must balance the right of a citizen to political privacy and the right of the State to self-protection. *Sweezy v. New Hampshire*, 354 U. S. 234 at 266-267. (1957). This, of course, is not to imply that the Commission deems Appellant's attempt to equate questions concerning his association and/or activities in La Cosa Nostra with an invasion of political expression or freedom of association (or belief) anything less than arrogant and frivolous and hardly one of substance.

### CONCLUSION

The Appellant has not properly raised any substantial federal constitutional question which warrants the further attention of this Court and, therefore, it is respectfully urged that this appeal be dismissed.

Respectfully submitted,

NEW JERSEY STATE COMMISSION  
OF INVESTIGATION,  
By: WILBUR H. MATHESIUS,  
KENNETH P. ZAUBER,  
*Counsel.*



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In The

# Supreme Court of the United States

\_\_\_\_\_  
**OCTOBER TERM, 1970**

\_\_\_\_\_  
**NO. 91**

\_\_\_\_\_  
**JOSEPH ARTHUR ZICARELLI,**

*Appellant,*

*vs.*

**THE NEW JERSEY STATE COMMISSION OF INVESTIGATION.**

\_\_\_\_\_  
**APPEAL FROM THE SUPREME COURT OF NEW JERSEY**

## **BRIEF FOR APPELLANT**

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### Argument:

Point I. Appellant's incarceration for civil contempt pursuant to an immunity statute which only granted immunity from the subsequent use of compelled testimony and any fruits thereof, but which failed to grant absolute immunity from prosecution, was in violation of his privilege against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments. . . . . 10

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1970

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No. 91

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JOSEPH ARTHUR ZICARELLI,

Appellant,

v.

THE NEW JERSEY STATE COMMISSION  
OF INVESTIGATION

---

ON APPEAL FROM THE SUPREME COURT OF  
NEW JERSEY

---

BRIEF FOR APPELLANT

---

**Opinion Below**

The opinion of the Supreme Court of New Jersey is reported at 55 N.J. 249, 261 A.2d 129 (1970) and appears in the printed appendix at pages 126 to 154. The opinion of the Superior Court, Law Division, Mercer County, is not officially reported and appears in the printed appendix at pages 118 to 123.

## Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on January 20, 1970. Notice of Appeal, pursuant to Rule 10, was filed on February 2, 1970. The jurisdictional statement was filed on February 16, 1970 and probable jurisdiction was noted on March 1, 1971, limited to questions 1, 2, 3 and 4 as set forth in the jurisdictional statement. The jurisdiction of the Court is invoked pursuant to Title 28, United States Code, Section 1257(2).

## The Constitutional and Statutory Provisions Involved

### United States Constitution:

#### Amendment V —

No person . . . shall be compelled in any criminal case to be a witness against himself.

#### Amendment XIV, Section 1 —

[N]or shall any state deprive any person of life, liberty or property without due process of law . . . .

New Jersey Statutes Annotated. Title 52, Chapter 9M, Section 17 (L. 1968, c. 266, §17) —

a. If, in the course of any investigation or hearing conducted by the commission pursuant to this act, a person refuses to answer a question or questions or produce evidence.

of any kind on the ground that he will be exposed to criminal prosecution or penalty or to a forfeiture of his estate thereby, the commission may order the person to answer the question or questions or produce the requested evidence and confer immunity as in this section provided. No order to answer or produce evidence with immunity shall be made except by resolution of a majority of all the members of the commission and after the Attorney General and the appropriate county prosecutor shall have been given at least 24 hours written notice of the commission's intention to issue such order and afforded an opportunity to be heard in respect to any objections they or either of them may have to the granting of immunity.

b. If upon issuance of such an order, the person complies therewith, he shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate, except that such person may nevertheless be prosecuted for any perjury committed in such answer or in producing such evidence, or for contempt for failing to give an answer or produce evidence in accordance with the order of the commission; and any such answer given or evidence produced shall be admissible against him upon any criminal investigation, proceeding or trial against him for such perjury, or upon any investigation, proceeding or trial against him for such contempt.



Sections 9M-1 to 9M-18 are set out at length in Appendix A hereto.

### **Questions Presented**

1. Whether appellant's commitment for contempt as a result of his refusal to answer self-incriminating questions after a grant of immunity pursuant to a state statute which only prevents the subsequent use of his compelled testimony and evidence derived therefrom but which fails to grant absolute immunity from prosecution by the questioning jurisdiction, violates appellant's rights under the Fifth and Fourteenth Amendments.

2. Whether a state immunity statute which only prevents the subsequent use of compelled testimony if the answers given are "responsive" is so vague as to violate the Due Process Clause of the Fourteenth Amendment.

3. Whether any immunity statute can supplant the Fifth Amendment's self-incrimination privilege with respect to an individual who has a real fear of foreign prosecution.

### **Statement**

Appellant was subpoenaed to appear before the New Jersey Commission of Investigation (hereafter called the Commission), a body created pursuant to New Jersey Statutes Annotated, Chapter 52, Section 9M-1, et seq. (Appendix A hereto). The subpoena stated that the investigation concerned; generally, the enforcement of the law in Long Branch, New Jersey, with particular reference to organized crime and racketeering (2a-4a). In

response to the subpoena appellant appeared before the Commission on July 8, 1969. He was ordered to return on July 10, and, in response to questions asked of him on that date, invoked his privilege against self-incrimination and refused to answer. He was then ordered to reappear on August 20, 1969.

On August 20, 1969, appellant appeared before the Commission and was asked a series of 100 questions (4a-44a). After refusing to answer the first of those questions, appellant was advised that the Commission had granted him immunity, pursuant to N.J.S.A. 52:9M-17, and he was directed to answer the question (12a-17a; 44a). Notwithstanding the purported grant of immunity, appellant persisted in his refusal to answer (17a). Appellant specifically challenged the validity of the immunity provision (11a). Immediately upon completion of the questioning, appellant was served (42a) with a petition (45a-60a) and Order to Show Cause why he should not be adjudged in contempt and committed to the Mercer County Jail until such time as he should purge himself of contempt by testifying as ordered (61a). The Order to Show Cause was returnable forthwith before the Superior Court Judge who had signed it. The petition, which was dated the same date, and signed by the Commission Chairman, stated that appellant had refused to answer the questions asked of him on August 20. Since the petition was served upon appellant while the Commission was still in session and since the questioning of appellant had been done by the Chairman, it was clear that the petition had been prepared before the questioning began and had been signed before the questioning concluded. It was likewise clear that the Order to

Show Cause had been signed before the questioning of appellant was completed.

On September 16, 1969, a hearing was held upon the Order to Show Cause (62a-108a). During the course of the hearing, counsel for the Commission and for appellant agreed to stipulate to certain matters which appellant had sought to prove at the outset of the hearing (65a-66a). These stipulations were as follows:

(1) That Zicarelli had been the object of very extensive publicity referring to him not only as a racketeer and a member of Cosa Nostra, but also an "internationalist" in crime.

(2) That Zicarelli's activities, associations and reputation are well known to the Commission.

(3) That Zicarelli had been the subject of numerous subpoenas, surveillances and investigations over the past ten years by both federal and state authorities.

(4) That Zicarelli was, by governmental pronouncement, a main or prime target for prosecution.

Appellant sought the opportunity to question the Executive Director of the Commission with a view towards discovering whether the Commission already had some, if not all, of the information which it sought to elicit from appellant (67a-86a). However, that request was denied (86a-90a). Nu-



merous newspaper and magazine articles dealing with appellant and his reputed criminal activities in New Jersey, in other states and in foreign countries, were also placed in evidence at the hearing (90a-102a).

On September 18, legal arguments were concluded, with respect to the validity of the immunity provision (109a-117a) as well as other matters, and the trial judge, rejecting all of appellant's arguments, including his attack on the immunity statute, found him in contempt and ordered him to jail until he should purge himself by answering the questions posed by the Commission (118a-125a).

Appellant's appeal to the Appellate Division of the Superior Court was certified directly to the Supreme Court of New Jersey on its own motion. On January 20, 1970, the Supreme Court, in an opinion by Chief Justice Weintraub, upheld the trial court's contempt order (126a-154a). With respect to the attack on the constitutionality of the immunity statute, N.J.S.A. 52:9M-17, the Court ruled that the Fifth Amendment does not require "transactional immunity" or "immunity from prosecution," but that an immunity from the use of the compelled testimony was sufficient (140a-148a). Concerning appellant's contention that he was not protected against prosecution in a foreign land, the Court held that even if "liability under foreign law were now relevant," the danger of such prosecution in appellant's case was "too imaginary and unsubstantial to sustain a refusal to answer" (148a). The Court also held that the statutory requirement that a witness is only protected from the use of a "responsive"



answer was valid in that it would protect the witness "against answers and evidence he in good faith believed were demanded" (148a).

On March 1, 1971 this Court noted probable jurisdiction limited to questions 1, 2, 3 and 4 as set forth in the jurisdictional statement (155a-156a).

### Summary of Argument

Appellant's constitutional privilege against self-incrimination has been violated by his being held in contempt for refusal to answer questions before the New Jersey State Commission of Investigation after having been granted immunity pursuant to N.J. S.A. 52:9M-17. That statute merely provides for immunity from the use of a compelled answer or evidence derived therefrom but fails to provide for absolute immunity against prosecution by the compelling jurisdiction, also called "transactional immunity." Ever since this Court's decision in Counselman v. Hitchcock, 142 U.S. 547 (1892), a witness has been entitled to immunity from prosecution for any transaction to which his testimony relates. That transactional immunity rule has been generally followed by the states, nearly always adhered to by Congress, and has been consistently reaffirmed and reiterated by this Court on numerous occasions. Murphy v. Waterfront Commission, 378 U.S. 52 (1964), did not affect the transactional immunity standard where a single jurisdiction was concerned but merely imposed a use restriction between federal and state governments with respect to testimony compelled by either sovereign. Not only is the transactional

immunity requirement deeply imbedded in our jurisprudence but it also promotes the values, policies, and purposes of the self-incrimination clause. Since, under use-immunity, a criminal prosecution may still result based upon "independent" evidence, an individual might find himself prosecuted for a matter concerning which he was forced to give incriminating testimony. Such a result would violate both the letter and the spirit of the constitutional provision. Use immunity also presents enormous practical problems for a witness in attempting to show that a subsequent prosecution was causally related to his compelled testimony, notwithstanding that the state might have the initial burden of showing the absence of taint. The wide dissemination of incriminating testimony, made a virtual certainty here due to the Commission's statutory scheme, will make it nearly impossible, as a practical matter, for a defendant to refute the State's showing of independent origin, particularly after any substantial period of time. Numerous and protracted court hearings would also be invited. Transactional immunity, on the other hand, presents none of these problems since it makes the positions of all parties quite clear.

The immunity statute in question here violates the due process clause of the Fourteenth Amendment by its requirement that immunity only attach to a "responsive" answer. The statute provides no guidelines for determining what is a responsive answer and thus suffers from an unconstitutional vagueness. The interpretation of the Court below, that it protects answers given "in good faith," does not cure the defect.

Appellant made a sufficient showing in the Court below that he had a real fear of foreign prosecution. Such a possibility is now a relevant consideration in evaluating a claim of self-incrimination under the Fifth Amendment. This follows both from Murphy v. Waterfront Commission, 378 U.S. 52 (1964), and from that interpretation of the Fifth Amendment required to meet the realities of modern times. Since no immunity statute, state or federal, can provide for either use or transaction immunity with respect to foreign prosecution, appellant's self-incrimination claim should have been sustained despite the purported grant of immunity.

### **Argument**

#### **Point I**

APPELLANT'S INCARCERATION FOR CIVIL CONTEMPT PURSUANT TO AN IMMUNITY STATUTE WHICH ONLY GRANTED IMMUNITY FROM THE SUBSEQUENT USE OF COMPELLED TESTIMONY AND ANY FRUITS THEREOF, BUT WHICH FAILED TO GRANT ABSOLUTE IMMUNITY FROM PROSECUTION, WAS IN VIOLATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS.

A. Prior decisions of this Court have consistently reaffirmed and reiterated the transactional immunity standard in cases involving a single jurisdiction.

The first federal immunity statute was enacted in 1857 in support of an investigation of charges

that members of Congress were extorting money from private persons interested in certain legislation. That 1857 Act, granting a "transactional immunity" read, in pertinent part as follows:

"No person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify . . . ." 11 Stat. 155-166 (1857)

Due to the loose phrasing of the statute, which gave immunity merely as a result of testifying before a congressional committee, numerous "immunity baths" took place, Note, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L. J. 1568, 1572 (1963) and, in 1862, the act was rewritten as follows:

"The testimony of a witness-examined and testifying before either House of Congress or any committee of either House of Congress, shall not be used as evidence in any criminal proceedings against such witness in any court of Justice . . . ." 12 Stat. 333 (1862)

In 1868 Congress passed another immunity statute, following the 1862 formula, which read, in pertinent part, as follows:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be



given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture." 15 Stat. 37 (1868)

It was this 1868 statute which came before the Court in Counselman v. Hitchcock, 142 U.S. 547 (1892). In that case, Counselman was granted immunity and thereafter questioned concerning certain violations of the Interstate Commerce Act. He refused to answer and was convicted of contempt. In reversing his conviction, this Court held that statute unconstitutional in that it did not protect a witness from the use of his testimony to search out other testimony or witnesses against him. However, noting that the Fifth Amendment "must have a broad construction in favor of the right which it was intended to secure," 142 U.S. at 562, this Court went on to set out what it deemed to be the full extent of the privilege:

"We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the incriminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional prohibition, a statutory enactment to be valid must afford absolute immunity against future prosecu-

tion for the offense to which the question relates . . ." 142 U.S. at 585-586 (emphasis added).

That this choice of "transactional immunity," as it has come to be called, was no mistake is made clear by the three state cases upon which the Court expressly relied in making its ruling. 142 U.S. at 585. Emery's Case, 107 Mass. 172 (1871), Cullen v. Commonwealth, 24 Gratt. 624 (Va. 1873) and State v. Nowell, 58 N.H. 314 (1878), all involved state statutes which were struck down due to their failure to accord immunity from prosecution. 142 U.S. at 571-578. Indeed, immediately following the above quoted language the Court specifically said that it was giving its assent "to the doctrine of Emery's Case," 142 U.S. at 586.

The transactional immunity standard set forth in Counselman "has been consistently reaffirmed and reiterated in both holding and dicta ever since, and has never been seriously questioned in a case involving the actions of a single jurisdiction." Piccirillo v. New York, \_\_\_ U.S. \_\_\_, 27 L.Ed. 2d 596, 609-610 (1971) (Mr. Justice Brennan, dissenting.)

Only four years later, in fact, in Brown v. Walker, 161 U.S. 591 (1896), this Court made it quite clear that the transaction, or "absolute" immunity language in Counselman was no mere inadvertence. In response to Counselman, Congress had passed, in 1893, a broadly phrased immunity statute which provided as follows:

"But no person shall be prosecuted or sub-

jected to any penalty, or forfeiture for or on account of any transaction, matter, or thing, concerning which he may testify or produce evidence, documentary or otherwise . . . .” Act of February 11, 1893, c. 83, 27 Stat. 443 (1893).

In Brown v. Walker, supra, this Court upheld the constitutionality of this statute by a 5-4 vote. Throughout the majority opinion reliance was placed upon the transactional immunity standard enunciated in Counselman. After quoting the key language from Counselman, 142 U.S. at 585-586, the Court in Brown went on to state:

“The inference from this language is that, if the statute does afford such immunity against future prosecution, the witness will be compellable to testify.” 161 U.S. at 594

The Court went on to note that if the witness’ testimony,

“ . . . operates as a complete pardon for the offense to which it relates — a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question.” 161 U.S. at 595

The four dissenting Justices in Brown felt that even the broad immunity granted by the 1893 Act was insufficient. 161 U.S. at 610-638

In the years following Brown v. Walker, supra, this Court has consistently reaffirmed the absolute or transactional immunity standard of Counselman. Hale v. Henkel, 201 U.S. 43, 67 (1906)

("But if the criminality has already been taken away, the Amendment ceases to apply"); McCarthy v. Arndstein, 266 U.S. 34, 42 (1924); (The statute in question did not provide "complete immunity from prosecution"); United States v. Murdock, 284 U.S. 141, 149 (1931) ("The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination"); Smith v. United States, 337 U.S. 137, 146-147, 150 (1949) (Counselman "established that absolute immunity from federal criminal prosecution for offenses disclosed by the evidence must be given a person compelled to testify after claim of the privilege against self-incrimination"; "only absolute immunity from federal criminal prosecution is sufficient to compel the desired testimony"); United States v. Bryan, 339 U.S. 323, 336 (1950). (A witness who is offered only "use" immunity, "rather than complete immunity from prosecution for any act concerning which he testifies may claim his privilege and remains silent with impunity.")

In the light of this continuous reaffirmation of Counselman's transactional immunity standard for over half a century, it is not surprising that in Ullman v. United States, 350 U.S. 422, 438 (1956), Mr. Justice Frankfurter was able to state that the language of the 1893 statute "has become part of our constitutional fabric."<sup>1</sup>

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1. Ever since Counselman virtually every federal immunity statute has provided for absolute immunity against prosecution in language which has become known as transactional immunity



In that case this Court reaffirmed the conclusion of the majority in Brown v. Walker, 161 U.S. 591 (1896), that Congress could override the privilege against self-incrimination by a statute granting transactional immunity. Mr. Justice Douglas and Mr. Justice Black, dissenting, would have overruled Brown v. Walker, *supra*, and adopted "the view of the minority in that case that the right of silence created by the Fifth Amendment is beyond the reach of Congress." 350 U.S. at 440-453. See Piccirillo v. New York, \_\_\_ U.S. \_\_\_ 27

(Cont'd)

(immunity from prosecution "for or on account of any transaction, matter or thing" concerning which the witness is compelled to testify or produce evidence). See Ullman v. United States, 350 U.S. 422, 438 (1956); 8 Wigmore, Evidence, sec. 2281 (McNaughton rev. 1961); Wendel, Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion, 10 St. Louis U.L.J. 327, 371 (1966); Note, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L.J. 1568, 1611 (1963). The most recent such statute may be found in 82 Stat. 216, 18 U.S.C. §2514, (1968). The first major enactment to deviate from that tradition, the Organized Crime Control Act of 1970, 18 U.S.C. §6001-6003, was recently held unconstitutional, under Counselman, in In the Matter of the Grand Jury Testimony of Joanne Kinoy, \_\_\_ F.S. \_\_\_ (D.C. S.D.N.Y. 1971).

Likewise, even prior to Malloy v. Hogan, 378 U.S. 7, (1964), the vast majority of state cases adhered to the transactional immunity requirement. Annotation, Incriminating Disclosures—Immunity, 53 A.L.R. 2d 1030, 1032 (1957); State v. Prato, 2 Ohio, App. 2d 115, 206 N.E. 2d 917 (Ct. of App. 1965); State v. Kirtley, 327 S.W. 2d 166 (Sup. Ct. Mo. 1959). In addition, the Commissioners on Uniform State Legislation have suggested transactional immunity as the standard to be followed by the states, Model State Witness Immunity Act, 9 U.L.A. 186, et seq. (1957). All of the state and federal statutes are collected in an appendix to the Brief For Petitioner filed in Piccirillo v. New York, \_\_\_ U.S. \_\_\_, 27 L.Ed. 2d 596 (1971).

L.Ed. 2d 596, 608 (1971) (Mr. Justice Brennan, dissenting). It is clear that at this critical juncture the Court was under no misapprehension concerning the necessity of a transactional immunity standard, for over a decade earlier in United States v. Monia, 317 U.S. 424, 434 (1943), Mr. Justice Frankfurter, in referring to Brown v. Walker in his dissenting opinion said:

"There was no indication [in Brown] of any belief that Congress had given anything more than it had to give — and, indeed, only a bare majority of the Court thought that the statute had given as much as the Constitution had required."

The Supreme Court of New Jersey, in sustaining the validity of the use immunity granted by N.J.S. 2A:52:9M-17, proceeded upon the view that Murphy v. Waterfront Commission, 378 U.S. 52 (1964), had dealt a fatal blow to transactional immunity. In re Zicarelli, 55 N.J. 249, 268-270, 261 A.2d 129, 137-140 (1970); Uniformed Sanitation Men Association, Inc., v. Commissioner of Sanitation of the City of New York, 426 F.2d 619, 624 (2nd Cir. 1970).<sup>2</sup> In that view, however, the Court was clearly in error.

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2. Other cases since Murphy expressing a similar view are United States ex rel. Cliffo v. McCloskey, 273 F.Supp. 604 (S.D.N.Y. 1967); Application of Longo, 280 F.Supp. 185 (S.D. N.Y. 1967); People v. La Bello, 24 N.Y. 2d 598, 301 N.Y.S. 2d 544, 249 N.E. 2d 412 (Ct. of App. 1969), cert. granted sub nom Piccirillo v. New York, 397 U.S. 933 (1970, dismissed as improvidently granted) U.S. 27 L.Ed. 2d 596 (1971); Byers v. Justice Court for Ukiah Judicial District, 80 Cal. Repr. 553, 458 P.2d 465, 472 (Sup. Ct. 1969), cert. granted, California v. Byers, 397 U.S. 1035 (1970).

Murphy held that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him," and that, in order to implement this rule "the Federal Government must be prohibited from making any such use of compelled testimony and its fruits." 378 U.S. at 79. It should be noted, at the outset, that the immunity statute involved in Murphy was one which did grant the witness transactional immunity under the laws of the compelling sovereign. 378 U.S. 53. Murphy was involved solely with the accommodation in federal-state relations made necessary by the Court's ruling, on that same day, in Malloy v. Hogan, 378 U.S. 1 (1964), that the Fifth Amendment provision against self-incrimination was applicable to the states. It can hardly be assumed that this Court repudiated, sub silentio, as important and long-standing a doctrine as that of transactional immunity in a case where the issue was never in focus and where, on the contrary, Counselman was cited with approval. 378 U.S. at 54. But see 378 U.S. at 92-107 (concurring opinion of Mr. Justice White). As noted above, Murphy was decided on the same day as Malloy which extended the Fifth Amendment self-incrimination privilege to the states. It is difficult to believe that this Court would widen the applicability of the privilege, on the one hand, while restricting its scope, on the other. The more reasonable interpretation is that Murphy,

"... broadened rather than restricted the protection of the Fifth Amendment's privilege against self-incrimination. The reason the



Court extended the protection of the privilege in a cross-jurisdiction situation only to use of the compelled testimony and its fruits, and not to prosecution immunity was out of considerations of federalism. Thus it minimized interference with the law enforcement prerogatives of the non-questioning jurisdiction." In the Matter of the Grand Jury Testimony of Joanne Kinoy, \_\_\_ F.S. \_\_\_ (D.C.S.D. N.Y. 1971)

A similar view was expressed by Professor Mansfield when he said:

"It does not follow that because the Murphy result is appropriate in the adjustment of federal-state relations that it will also apply when only a single jurisdiction is involved. Murphy did not hold that it would satisfy the privilege if the jurisdiction demanding incriminating information only gave assurances that it would not make prosecutory use of the information, and did not give immunity from prosecution for the matters disclosed." Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and The Government's Need for Information, 1966 Supreme Court Review, 103, 164-166

That Murphy did not decide the issue involved in this case is made most clear by several opinions in the years following. In Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965), this Court, in a unanimous opinion, held that the immunity granted by §4(f) of the Subversive Activities Control Act of 1950, 64 Stat.



992, 50 U.S.C. §783 (f), was invalid under Counselman. This Court specifically noted that Counselman required "absolute immunity against future prosecution for the offense to which the question relates." 382 U.S. at 80. In Stevens v. Marks, 383 U.S. 234 (1966), both Mr. Justice Douglas, writing for the majority, 382 U.S. at 244-245, and Mr. Justice Harlan, concurring in part and dissenting in part, 382 U.S. at 249-250, specifically noted that the question was still open. In the light of these post-Murphy expressions it cannot seriously be thought, as did the court below, that a passing reference to use immunity in Gardner v. Broderick, 392 U.S. 273, 276 (1968), has settled the problem. Just this term both Mr. Justice Brennan and Mr. Justice Douglas have likewise made it clear that Murphy did not resolve the matter. Piccirillo v. New York, U.S. \_\_\_\_ 27 L.Ed. 2d 596, 599, 605, (1971) (dissenting opinions). As of today the transactional immunity requirement remains unimpaired and firmly embedded in our jurisprudence. The question remains whether the established rule should be left undisturbed.

B. The language of the Fifth Amendment and the values which it serves compel a transactional immunity standard.

In his recent dissenting opinion in Piccirillo v. New York, U.S. \_\_\_\_ 27 L.Ed. 2d 596, 606 (1971), Mr. Justice Brennan pointed out that mere use immunity, "satisfies neither the language of the Constitution itself, nor the values, purposes, and policies which the privilege was historically designed to serve and which it must serve in a free country." Appellant can do no

better than to adopt those arguments in this case.

With respect to the words of the privilege, Mr. Justice Brennan pointed out that the self-incrimination clause "prohibits the application of non of compulsion to an individual to force testimony which incriminates him, regardless of whether he is actually prosecuted." 27 L.Ed. 2d at 607 Since the reach of the privilege is the possibility of a criminal charge and not whether one is in fact brought, it is only when there is no possibility of a criminal case that the privilege ceases to apply. Thus, if one has been pardoned or if the statute of limitations has expired, for example, the demands of the clause would be satisfied. Mere use immunity, however, does not provide these safeguards. Under such an immunity, Mr. Justice Brennan pointed out, the individual is still being compelled to testify against himself in a situation where there remains the possibility of a criminal case relating to that very testimony. The fact that the criminal case may not be based upon that compelled testimony does not avoid the problem. The individual is "still being forced by the State to admit criminal conduct for which he may be punished, albeit not on the basis of his compelled testimony." Thus, use immunity "permits the compulsion without removing the criminality." 27 L.Ed. 2d at 609.

Use immunity fares no better when the policies, purposes and values of the privilege are considered. As Mr. Justice Frankfurter stated in Ullman v. United States, 350 U.S. 422, 426 (1956), "[t]his constitutional protection must not be interpreted in a hostile or niggardly spirit." Among the values which the privilege serves are the

following:

"[O]ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'; our distrust of self-deprecatory statements; and our realization that the privilege while sometimes 'a shelter to the guilty,' is 'often a protection to the innocent.'" Murphy v. Waterfront Comm'n., 378 U.S. at 55 (citations omitted).

There can be no doubt that many of these values are offended by the application of the use-immunity statute in this case. Appellant has certainly been subjected to the "cruel trilemma of self-accusation, perjury or contempt." Having once chosen contempt he is to remain imprisoned for the rest of his life if he adheres to that stand. That "sense of fair play" which requires a "government to leave the individual alone until good cause is shown for disturbing him" surely recoils at the situation below where appellant's interrogators took the position that even if they had

the answers to all of the questions asked of the witness the Commission would still be entitled to hear the incriminatory answers "from the horse's mouth" (84a). Where the government seeks to play these cruel games upon an individual more than use immunity should be offered. As Mr. Justice Brennan has pointed out in Piccirillo, use immunity does not leave the individual and the state in the same position as if the witness had not testified. The individual has been compelled to incriminate himself and remains liable to prosecution, while the state has gained information which may help it in its investigations and which may, if pursued long enough, produce evidence sufficiently "independent" to permit prosecution of the individual for the very crime about which incriminating testimony has been compelled. 27 L.Ed. 2d at 608-609. This is surely not conducive to a "fair state-individual balance." See In the Matter of the Grand Jury Testimony of Joanne Kinoy, \_\_\_\_ F.S. \_\_\_\_ (D.C. S.D. N.Y. 1971).

The words of Judge Magruder concerning the self-incrimination privilege in Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1954) are particularly appropriate here:

"If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion."

C. Compelling practical considerations support retention of the transactional immunity standard.



Despite the fact that under a use immunity statute the government would undoubtedly have the burden of establishing, in a subsequent prosecution, that its evidence was untainted, Murphy v. Waterfront Commission, 378 U.S. 52, 79 footnote 18, (1964), enormous practical difficulties would still remain,

"... in attempting to ascertain whether a subsequent prosecution of an individual, who has previously been compelled to incriminate himself in regard to the offense in question, derives from the compelled testimony or from an 'independent source' Piccirillo v. New York, \_\_\_\_ U.S. \_\_\_\_, 27 L.Ed. 2d 596, 609, (Mr. Justice Brennan, dissenting).

These practical problems, noted as long ago as in Brown v. Walker, 161 U.S. 591, 622 (1896), (Mr. Justice Shiras, dissenting), are both numerous and compelling. As Mr. Justice Brennan said in Piccirillo, supra, at 609:

"In dealing with a single jurisdiction, we ought to recognize the enormous difficulty in attempting to ascertain whether a subsequent prosecution of an individual, who has previously been compelled to incriminate himself in regard to the offense in question, derives from the compelled testimony or 'from an 'independent source.' For one thing, all the relevant evidence will obviously be in the hands of the government — the government whose investigation included compelling the individual involved to incriminate himself. Moreover, this argument does not depend upon assumptions of misconduct or

collusion among government officers. It assumes only the normal margin of human fallibility. Men working in the same office or department exchange information without recording carefully how they obtained certain information; it is often impossible to remember in retrospect how or when or from whom information was obtained. By hypothesis, the situation involves one jurisdiction with presumably adequate exchange of information among its various law enforcement officers. Moreover, the possibility of subtle inferences drawn from action or non-action on the part of fellow law enforcement personnel would be difficult if not impossible to prove or disprove. This danger, substantial when a single jurisdiction both compels incriminating testimony and brings a later prosecution, may fade when the jurisdiction bringing the prosecution differs from the jurisdiction which compelled the testimony. Concern over informal and undetected exchange of information is also correspondingly less when two different jurisdictions are involved."

The situation hypothesized by Mr. Justice Brennan, involving "one jurisdiction with presumably adequate exchange of information among its various law enforcement officers," has become a cold reality in this case. The statute governing the State Commission of Investigation provides as follows:

- (1) "Upon request of the Attorney General, a county prosecutor or any other law enforcement official, the Commission shall cooperate with, advise and assist them in the per-

formance of their official powers and duties."  
N.J.S.A. 52:9M-5

(2) "The Commission shall cooperate with departments and officers of the United States Government in the investigation of violations of the Federal laws within this state." N.J.S.A. 52:9M-6

(3) "The Commission shall inquire into matters relating to law enforcement extending across the boundaries of the State into other States; and may consult and exchange information with officers and agencies of other States with respect to law enforcement problems of mutual concern to this and other States." N.J.S.A. 52:9M-7

(4) "Whenever it shall appear to the Commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the commission shall refer the evidence of such crime or misconduct to the officials authorized to conduct the prosecution or to remove the public official." N.J.S.A. 52:9M-8

As a result of these four provisions, which appear, for the most part, to be mandatory in nature, it is a virtual certainty that not only will there be an "adequate exhanche of information" among law enforcement officers, both within the jurisdiction and without, but that the compelled incriminating information will receive as wide a dissemination as possible. This both heightens the likelihood of eventual prosecution and increases the burden upon a defendant seeking to show a connection with the

compelled testimony. As Mr. Justice White has noted, "where there is only one government involved . . . not only is the danger of prosecution more imminent" but "the likely purpose of the investigation [is] to facilitate prosecution and conviction . . . ." Murphy v. Waterfront Commission, 378 U.S. 52, 98 (1964) (Concurring opinion). Nor does the fact that, technically, the burden may be upon the Government, solve the problems involved. Note, 61 Northwestern U.L. Rev. 654, 663-666 (1966). As Judge Motley has recently said:

"To say that a witness can successfully rebut the Government's proof that its source is untainted is to be naive about the imbalance which daily attends the resources of Government as opposed to those of the average defendant in a criminal case." In the Matter of the Grand Jury Testimony of Joanne Kinoy, \_\_\_\_ F.S. \_\_\_\_ (D.C.S.D.N.Y.).

In commenting upon the practical problems involved in use-immunity, Professor Mansfield has put the case as follows:

"As a practical matter, will it be possible to determine whether the government's evidence was obtained independently? Suppose the evidence used to convict has no causal connection with the compelled disclosure other than that it provided the reason for commencing an investigation? It can of course be said that an investigation could have resulted from the mere fact that a person invoked the privilege and declined to answer questions. But when an incrimin-



ating disclosure has actually been made, a subsequent investigation is, realistically, likely to be more focused. The upshot of a rule restricted to forbidding prosecutory use may be that a person is in fact much worse off in regard to the danger of prosecution and conviction than if he had remained silent." Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966 Supreme Court Review 103, 165.

As the same author has said, it may turn out that "the theory of protection from prosecutory use is simply a cloud of words behind which the substance of the privilege is lost." Mansfield, supra at 165.

Adoption of a use-immunity standard would also add yet another type of pretrial motion to burden courts already beset by a mounting caseload. As Judge Motley put it, In the Matter of the Grand Jury Testimony of Joanne Kinoy, supra,

"If the granting government could proceed to prosecute after a witness has testified but would have the burden in every case of proving that its evidence is untainted (especially in the case of the instant Act which is applicable to all federal criminal laws), a motion to suppress the evidence would inevitably follow every such indictment. Assuming that there would be many such cases because of Congress' determination to eliminate transactional immunity, the federal

district courts would have an automatic new burden of protracted litigation." (Emphasis added.)

Of course, the same may be said concerning what would result in the state courts. See also, Ullman v. United States, 350 U.S. 422, 444 (1955) (Mr. Justice Douglas, dissenting):

On the other hand,

"Transactional immunity raises none of these problems. It provides the individual with an assurance that he is not testifying about matters for which he may later be prosecuted. No question arises of tracing the use or non-use of information gleaned from the witness' compelled testimony. The sole question presented to a court is whether the subsequent prosecution is related to the substance of the compelled testimony. Both witness and government know precisely where they stand. Respect for law is furthered when the individual knows his position and is not left suspicious that a later prosecution was actually the fruit of his compelled testimony." Piccirillo v. New York, 27 L.Ed. 2d at 609.

It must be kept in mind that we are only dealing here with the extent of the immunity required to be granted by the sovereign seeking to compel the incriminating testimony. It does not necessarily follow that retention of transactional immunity in such a situation would require immunity from prosecution in other jurisdictions, be they state or federal. Different values are involved, the primary

of which is the fact that the compelling authority has the choice of "exchanging immunity for the needed testimony." Murphy v. Waterfront Commission, 378 U.S. 52, 92 (1964) (Mr. Justice White, concurring). Since the compelling sovereign is in a position to judge how much it needs the testimony it is not an unreasonable price to demand that, in exchange, it guarantee the witness against the danger of any criminal prosecution in that jurisdiction. This calls for a calculation by the immunity granting authority that its need for the information overrides the public interest in prosecuting the witness for his crimes. Note, 61 Northwestern U.L. Rev. 654, 660 (1966). The less immediate and less compelling threat of inter-jurisdictional prosecution can be adequately and fairly handled by retention of the Murphy standard.<sup>3</sup> To that extent the fears heretofore expressed by some members of this Court would be eliminated. Murphy v. Waterfront Commission, *supra*, at 703-712 (Mr. Justice White, concurring); Stevens v. Marks, 383 U.S. 234, 249-250 (1966) (Mr. Justice Harlan, concurring).

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3. See, however, the proposal for "reciprocal immunity" legislation by Hofstadter & Levittan, Immunity and the Privilege Against Self-Incrimination - Too Little for Too Much, 39 N.Y.S. Bar J. 105, 111 (1967), and the suggestions for legislation in Note, 20 Rutgers L. Rev. 336, 346-349 (1966).

## Point II

IN CONDITIONING THE GRANT OF IMMUNITY UPON THE GIVING OF A "RESPONSIVE" ANSWER, WITHOUT SUPPLYING ANY GUIDELINES FOR THE INTERPRETATION OF THAT CONDITION, THE STATUTE IS RENDERED SO VAGUE AS TO DENY APPELLANT DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

N.J.S.A. 52:9M-17 imposes a condition upon any grant of immunity conferred by the Commission. A witness is protected only if his answer to the question is "responsive."<sup>4</sup> The statute totally fails to set forth any clarifying guidelines as to what is, or what is not, a "responsive" answer. The Supreme Court of New Jersey, in upholding this portion of the statute, summarily held that the provision protects a witness from the use against him of answers and evidence given "in good faith." In re Zicarelli, 55 N.J. at 271, 261 A.2d at 140. Appellant submits that the statute, whether taken on its face or as construed by the court below, is patently violative of the Due Process Clause of the Fourteenth Amendment.

The statute is constitutionally defective under the "void-for-vagueness" doctrine heretofore enunciated by this Court. Forty-five years ago, this Court stated that:

"A statute which either forbids or re-

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4. Our research has failed to reveal any other immunity statute, state or federal, with such a condition.



quires the doing of an Act in terms so vague that men of common intelligence must necessarily guess as to its application violates the first essential of due process. . . ."

Connally v. General Construction Co., 269 U.S. 385, 391 (1926); Accord, Champlain Refining Co. v. Corporation Comm'n., 286 U.S. 210, 243 (1932).

In dealing with a First Amendment question in Smith v. California, 361 U.S. 147, 150-151 (1959), Mr. Justice Brennan said:

"This Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech, a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

It is suggested that, considering the historical purposes and values served by the Self-Incrimination Clause, such a "stricter standard" should also be applied to the statute here in question.

The wording of this statute, with its absence of any standard for adjudication as to the meaning of "responsive," produces a chilling and stifling effect upon what would otherwise be an incentive to answer.<sup>5</sup> The record below abundantly supports this proposition. Other than identifying himself, Zicarelli refused to answer any questions put to

5. Assuming the statute were otherwise valid by providing for transactional immunity.

him. This is not surprising when one considers that a "responsive" answer has been defined as one "constituting or comprising a complete answer." Black's Law Dictionary, (4th Ed. 1951). Thus, anything less than the foregoing would be subject to being characterized as non-responsive and, hence the immunity would not attach. It would be the determination of the Commission, as the operating agency, at least in the first instance, as to whether a given answer was responsive. This would create further problems, by permitting an executive or legislative authority to create its own standards as to responsiveness on an ad hoc basis and to fix varying standards of improper conduct. Cf. United States v. Brown, 381 U.S. 437, 442 (1965).

In dealing with the word "responsive" one must conclude that its ultimate applicability to a given situation would, of necessity, bring into play individual values, vagaries of judgment, and matters of degree. In that respect, the term is no more definite than such standards as "sacrilegious" or "immoral" which this Court has previously struck down as being too vague and indefinite to proscribe rights under the First and Fourteenth Amendments. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1950); Commercial Pictures Corp. v. Regents of Univ. of New York, 346 U.S. 587 (1954). The word "responsive" provides no more guidance than did such phrases as "loitering," "not giving a good account," and "profligateness," all of which led to the demise of the District of Columbia vagrancy statute on the grounds of vagueness. Ricks v. District of Columbia, 414 F.2d 1097 (D.C. Cir. 1968).

As in Champlain Refining Co. v. Corporation Comm'n., 286 U.S. 210, 243 (1932), the standard provided in this case is "so vague and indefinite as to be really no rule or standard at all." The witness cannot have any assurance beforehand that the answer he gives to a question will be more or less than what the interrogator desired. Nor does the problem stop at that point, for, the witness might, in any event, be left to the vagaries of a judgment as to responsiveness to be made many years after the questioning by a court unfamiliar with the nature of the present inquiry and with the intent of the questioner. The witness is truly left to answer at his peril, knowing that "litigation on a distant day," Ullman v. United States, 350 U.S. 422, 445 (1955) (Douglas, J. dissenting), may be required to determine if he chose correctly.

The interpretation of the statute by the Supreme Court of New Jersey leaves the witness no better off. The Court subsequently called upon to determine whether an answer was responsive would have to judge the "good faith" of the witness at the time the answer was provided. If a refusal to answer in good faith and on advice of counsel is no defense to a conviction for contumacy, Sinclair v. United States, 279 U.S. 263, 299 (1929), it hardly seems that the "good faith" standard proposed here is any more viable. The standard, as interpreted, remains as vague as it did before.

We are dealing here with a situation wherein government compulsion is being brought to bear upon an individual in order to compel him to testify against himself. When the freedom to remain silent is sought to be removed by an immunity statute, it should only be sanctioned with no strings

attached. See, Petition of Specter, 439 Pa. 404, 268 A.2d 104 (Sup. Ct. 1970). That, appellant suggests, is not too high a price for a sovereign to pay for compelling an individual to break faith with his own conscience. No one should "be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Accord, Giaccio v. Pennsylvania, 382 U.S. 399 (1966).

### Point III

AN INDIVIDUAL WHO CAN DEMONSTRATE A GENUINE FEAR OF FOREIGN PROSECUTION BASED UPON ANSWERS SOUGHT TO BE COMPELLED UNDER AN IMMUNITY STATUTE, CANNOT BE COMPELLED TO TESTIFY NOTWITHSTANDING THE SCOPE OF THE IMMUNITY OFFERED.

A. Fear of foreign prosecution is relevant in determining the validity of a Fifth Amendment claim of self-incrimination.

An immunity statute, of whatever scope, and whether enacted by our federal government or a state, is powerless to prevent either prosecution or use of testimony by a foreign sovereign, against the witness compelled to supply incriminating information.

In Murphy v. Waterfront Commission of New York, 378 U.S. 52, (1964), this Court recognized and approved the postulate that a witness has a constitutional right to invoke the Fifth Amendment when he has a demonstrable fear of foreign



prosecution. Appellant recognizes that no such question was before the Court, but, it is suggested that the Court could not have arrived at its specific holding otherwise. Writing for the majority, Mr. Justice Goldberg demonstrated how the Court had erred many years ago. He quoted from United States v. Murdock, 284 U.S. 141, 149 (1931), as follows:

"The English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. King of the Two Sicilies v. Willcox . . . Queen v. Boyes . . ." 378 U.S. at 71-72 (citations omitted).

Mr. Justice Goldberg went on to state:

"As has been demonstrated, the cases cited were in one instance overruled, and in the other inapposite, and the English rule was the opposite from that stated in this Court's opinion: The rule did 'protect witnesses against disclosing offenses in violation of the laws of another country.' United States of America v. McRae, supra." 378 U.S. at 72 (Emphasis added).

It thus appears that this principle of law was accepted by the majority in Murphy. Our research has disclosed only one other case in point since the decision in Murphy, that being In re Parker, 411 F.2d 1067 (10th Cir. 1969), cert. granted, judgment vacated as moot, sub nom Parker v. United States, 397 U.S. 96 (1970). In that case

the Tenth Circuit held that a witness upon whom immunity had been conferred could not thereafter refuse to answer questions on the ground of fear of self-incrimination under the laws of a foreign nation. The court specifically stated:

"The fifth amendment was intended to protect against self-incrimination for crimes committed against the United States and the several states but need not and should not be interpreted as applying to acts made criminal by the laws of a foreign nation." 411 F.2d at 1070.

That holding, we submit, cannot be squared with Murphy.

Whatever might have been the realities of a fear of foreign prosecution in another age, there can be no doubt that it has become a substantial threat in our present times. At the beginning of this year the United States was a party to ninety-one bilateral and one multi-lateral extradition treaties. Treaties in Force, (Department of State Publication 8567) (1971). When that fact is taken in conjunction with the world-wide dissemination of information and with the well-known cooperation of police authorities in many nations, there can be little doubt that one who is compelled to incriminate himself with respect to foreign crimes stands in very real fear of ultimate prosecution. The privilege should be viewed in the light of these modern developments, not treated as "an historical relic." Quinn v. United States, 349 U.S. 155, 162 (1954). In DeLuna v. United States, 308 F.2d 140, 151 (5th Cir. 1962), the court had this to say about the self-incrimination clause:

"Because the right is the result of successive accretions, it is not as severely bounded by historical origins, as are some legal institutions. It is more important to consider its line of growth, as indicative of an expanding right capable of encompassing new and novel situations today as in the past. If the expansion of the individual's right of silence comes at the expense of the power and efficiency of the State, that is but in accord with the nature of the right and its historical development."

Thus, whether based upon sound historical precedent, as Murphy suggests, or upon the realities of modern life, the privilege should clearly take into account the threat of foreign prosecution.

**B. Appellant has demonstrated a real and substantial fear of foreign prosecution.**

While conceding the possibility that foreign prosecution may now be relevant, the Supreme Court of New Jersey found that the danger of such prosecution in this case was "too imaginary and unsubstantial to sustain a refusal to answer." In re Zicarelli, 55 N.J. at 270, 261 A.2d at 140. As the following analysis will demonstrate, the court's conclusion was erroneous.

At the hearing before the Superior Court, Zicarelli introduced into evidence numerous newspaper and magazine articles bearing upon his self-incrimination claim. Several of those items were specifically pointed out to the trial court as dealing

with his claimed fear of foreign prosecution.<sup>6</sup> Those articles singled out Zicarelli as the "foremost internationalist" among criminals. Life Magazine, September 8, 1967, p. 101 (App. Ex. WZ-5C; 98a, 160a). The same magazine had this to say:

"But Zicarelli has an international sideline so extensive that he's practically a one-man state department for the Mob. He has holdings in Venezuela and the Dominican Republic, and throughout the hemisphere is known as the man to see for guns and munitions when a government is to be overthrown or a rebellion is to be put down. For example, through the years he shipped arms to Dominican leaders, selling with fine and profitable impartiality to Trujillo and the men who overthrew him." Life Magazine, September 1, 1967, p. 45 (App. Ex. WZ-5B; 97a, 158a).

Alleging Zicarelli's friendship with former Dominican Republic dictator Rafael Trujillo, Life went on to state that among Zicarelli's favors for Trujillo were the 1952 execution of Andres Requena, an anti-Trujillo exile, in New York, as well as the kidnapping and subsequent disappearance of

6. The propriety of such articles to demonstrate the reasonableness of the witness' fear of incrimination is beyond question. Hoffman v. United States, 341 U.S. 479 (1950); United States v. Singleton, 193 F.2d 464 (3rd Cir. 1952); rev'd. 343 U.S. 949 (1952); United States v. Marcello, 196 F.2d 436, 440 (5th Cir. 1952); In re Portelli, 245 F.2d 183, 185 (7th Cir. 1952); Alexander v. United States, 181 F.2d 480, 484 (9th Cir. 1950); United States v. Welsman, 111 F.2d 260 (2nd Cir. 1940); In re Levinson, 219 F.Supp. 589, 591, 593, (S.D. Cal. 1963).



Jesus De Galindez in New York in 1956. Life Magazine, September 8, 1967, p. 101 (161a).

Life Magazine also alleged that Zicarelli was involved with the manufacture in Canada of Laetrile, a purported cancer drug. The drug was said to be manufactured by Biozymes International and, in an interview with the head of that company, Life was told that the diversion of Laetrile from Canada to the United States was an offense against the Canadian Food & Drug regulations, as well as the similar United States regulations. The subject of the interview also stated that it is illegal to take the drug across the border and that Zicarelli was involved in this smuggling operation. Life Magazine, August 9, 1968, p. 24 (App. Ex. WZ-50; 98a, 170a-172a). Indeed, so well known was Zicarelli's reputation as an "internationalist in crime" that the Commission, at the hearing below, was willing to so stipulate (65a). (Emphasis added.)

Among the questions asked of Zicarelli before the Commission were many relating to his membership and position in the criminal conspiracy referred to as Cosa Nostra (e.g., 8a, 17a, 18a, 20a), including a specific question which inquired as to the geographical area in which Zicarelli had Cosa Nostra responsibilities (31a). While there were no questions referring directly to foreign criminal activity, Zicarelli might well conclude that the questions referred to would furnish a "link in the chain of evidence," Hoffman v. United States, 341 U.S. 479 (1950), leading to a foreign prosecution. As this Court stated in Hoffman, supra at 488, it must be "perfectly clear . . . that the answers cannot possibly have" a tendency to incriminate.

In accordance with the liberal construction given to the "link in the chain" concept, United States v. Ghandler, 380 F.2d 993, 997 (2d Cir. 1967), it is clear that the answers to some of the questions asked of Zicarelli might forge such connecting links to the crimes mentioned in the Life articles.<sup>7</sup>

Thus, considering the worldwide circulation of Life Magazine together with the statutory duties of the Commission to disseminate evidence of wrong-doing to state and federal law enforcement authorities, N.J.S.A. 52:9M-5; 52:9M-6; 52:9M-7; 52:9M-8, it does not take a lengthy stretch of the imagination to forecast that a witness' compelled admissions will eventually find their way into the hands of an interested foreign sovereign.<sup>8</sup>

The vast network of extradition treaties referred to earlier makes the likelihood of eventual prosecution even more of a reality. Canada, the Dominican Republic and Venezuela are all

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7. Even if only one question, out of the series asked by the Commission, was improper, a finding of contempt cannot be sustained based upon those that could have been safely answered. People v. Newmark, 312 Ill. 625, 144 N.E. 338, 341 (Sup. Ct. 1924); Foot v. Buchanan, 113 F.156 (Circuit Ct. N.D. Miss. 1902); Hebebrand v. State, 129 Ohio St. 574, 196 N.E. 912, 416 (Sup. Ct. 1935).

8. One of the alternate bases for the holding in In re Parker, supra, was that, considering the secrecy of federal grand jury testimony, there was little, if any, likelihood that the compelled testimony would find its way into the hands of the Canadian authorities. The statutory scheme of the Commission herein practically insures a contrary result in this case.

signatories to extradition treaties with the United States. Treaties in Force, (Department of State Publication 8567) (1971). Under the agreement with Canada, and the amendments thereto,<sup>9</sup> there are twenty-eight categories of criminal offenses for which Zicarelli could be extradited to Canada. While the agreement with the Dominican Republic<sup>10</sup> covers twenty-six categories of criminal offenses and that with Venezuela<sup>11</sup> covers twenty-three crimes, it does not appear that our citizens could

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9. 8 Stat. 572 (1842); 26 Stat. 1508 (1889); 32 Stat. 1864 (1900); 34 Stat. 1864 (1900); 34 Stat. 2903 (1905); 35 Stat. 2035 (1908); 42 Stat. 2224 (1922); 44 Stat. 2100 (1925). The extraditable offenses are murder, assault with intent to commit murder, piracy, arson, robbery, forgery, uttering forged documents, voluntary manslaughter, counterfeiting and uttering counterfeit money, larceny, receiving stolen goods, fraud by a bailee or trustee, perjury, rape, kidnapping, burglary, revolt, slavery, obtaining money or securities by false pretenses, destruction of railroads, abortion, bribery, bankruptcy offenses, assault upon a law officer, wilful desertion of non-support of a minor dependent, trafficking in narcotics.

10. Stat. 2468 (1909). The extraditable offenses are murder, attempted murder, rape, bigamy, arson, injury to a railroad, crimes at sea, piracy, destroying vessels, mutiny, assaults aboard ship, burglary, felonious entry, robbery, forgery, falsifying official acts, counterfeiting, embezzlement, kidnapping, larceny, obtaining money by false pretenses, perjury, fraud by a bailee or trustee, slavery, accessories. Under the multilateral agreement, 49 Stat. 3111 (1933) any offense which carries a minimum penalty of one year is now extraditable to the Dominican Republic.

11. 43 Stat. 1698 (1922). The extraditable offenses are murder, attempted murder, rape, bigamy, arson, injury to a railroad, crimes at sea, destroying vessels, mutiny, assault on ship-board, burglary, felonious entry, robbery, forgery, forgery of public documents, counterfeiting, embezzlement, kidnapping, larceny, obtaining money by false pretenses, fraud by a bailee or trustee, accessories.

be extradited under the terms of those treaties. Valentine v. United States ex rel Neidecker, 299 U.S. 5 (1936). Nevertheless, the danger with respect to Canada is clear enough, and even with respect to the other two nations Zicarelli could certainly be prosecuted if he ventured to travel there.<sup>12</sup>

In the light of this combination of factors it hardly appears that the danger of foreign prosecution is "imaginary and unsubstantial." Rather, it is suggested that the fear is both "real and appreciable." Murphy v. Waterfront Commission, 378 U.S. 52, 68 (1964). Since no immunity statute in our country, be it state or federal, can protect a witness, such as Zicarelli, from foreign prosecution<sup>13</sup>, the only method by which a witness with such a real fear can be protected is by permitting the Fifth Amendment privilege to prevail despite the immunity statute. In such a situation the statute would be void since the jurisdiction would be without power to convey the immunity promised. In this case since the fear of foreign prosecution was genuine Zicarelli's self-incrimination plea should have been sustained.

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12. This would be true as to certain types of offenses even if they were committed in the United States due to the so-called "protective principle" of international jurisdiction. Restatement, Foreign Relations Law of the United States, sec. 33 (1965); Strassheim v. Daily, 211 U.S. 280 (1910).

13. Under this argument the result would be the same whether transactional or use-immunity were granted. Use of the answer could no more be prevented than could prosecution.



**Conclusion**

Wherefore, for all the foregoing reasons, appellant prays that N.J.S.A. 52:9M-17 be declared unconstitutional under the Fifth and Fourteenth Amendment and that the judgment of the court below be reversed.

Respectfully submitted,

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**Appendix A New Jersey Statutes Annotated**

**TITLE 52, CHAPTER 9M  
(L. 1968, c. 266)**

**STATE COMMISSION OF INVESTIGATION**

**52:9M-1. Creation of commission; membership; compensation; vacancies**

There is hereby created a temporary State Commission of Investigation. The commission shall consist of 4 members, to be known as commissioners.

Two members of the commission shall be appointed by the Governor, one by the President of the Senate and one by the Speaker of the General Assembly, each for 5 years. The Governor shall designate one of his appointees to serve as chairman of the commission.

The members of the commission appointed by the President of the Senate and the Speaker of the General Assembly and at least one of the members appointed by the Governor shall be attorneys admitted to the bar of this State. No member or employee of the commission shall hold any other public office or public employment. Not more than 2 of the members shall belong to the same political party.

Each member of the commission shall receive an annual salary of \$15,000.00 and shall also be entitled to reimbursement for his expenses actually and necessarily incurred in the performance of his duties, including expenses of travel outside of

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the State.

Vacancies in the commission shall be filled for the unexpired term in the same manner as original appointments. A vacancy in the commission shall not impair the right of the remaining members to exercise all the powers of the commission.

L. 1968, c. 266, §1, eff. Sept. 4, 1968.

**Duration of Act:**

Section 20 of L. 1968, c. 266, provided: "This act shall take effect immediately and remain in effect until December 31, 1974."

**Title of Act:**

An Act creating a temporary State Commission of Investigation; prescribing its functions, powers and duties; making an appropriation therefor. L. 1968, c. 266.

**52:9M-2. Duties and powers**

The commission shall have the duty and power to conduct investigations in connection with:

a. The faithful execution and effective enforcement of the laws of the State, with particular reference but not limited to organized crime and racketeering;

b. The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

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c. Any matter concerning the public peace, public safety and public justice.

L. 1968, c. 266, §2, eff. Sept. 4, 1968.

52:9M-3. Investigation of public officers

At the direction of the Governor, or by concurrent resolution of the Legislature the commission shall conduct investigations and otherwise assist in connection with:

a. The removal of public officers by the Governor;

b. The making of recommendations by the Governor to any other person or body, with respect to the removal of public officers;

c. The making of recommendations by the Governor to the Legislature with respect to changes in or additions to existing provisions of law required for the more effective enforcement of the law.

L. 1968, c. 266, §3, eff. Sept. 4, 1968.

52:9M-4. Investigation of departments or agencies

At the direction or request of the Legislature by concurrent resolution or of the Governor or of the head of any department, board, bureau, commission, authority or other agency created by the State, or to which the State is a party, the commission shall investigate the management or affairs of any such department, board, bureau, com-



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mission, authority or other agency.  
L. 1968, c. 266, §4, eff. Sept. 4, 1968.

52:9M-5. Cooperation with law enforcement officials

Upon request of the Attorney General, a county prosecutor or any other law enforcement official, the commission shall cooperate with, advise and assist them in the performance of their official powers and duties.

L. 1968, c. 266, §5, eff. Sept. 4, 1968.

52:9M-6. Investigations of federal law violations

The commission shall cooperate with departments and officers of the United States Government in the investigation of violations of the Federal laws within this State.

L. 1968, c. 266, §6, eff. Sept. 4, 1968.

52:9M-7. Law enforcement problems extending into other states

The commission shall examine into matters relating to law enforcement extending across the boundaries of the State into other States; and may consult and exchange information with officers and agencies of other States with respect to law enforcement problems of mutual concern to this and other States.

L. 1968, c. 266, §7, eff. Sept. 4, 1968.

52:9M-8. Referral of evidence of officers crime or misconduct to officials for prosecution or removal

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Whenever it shall appear to the commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the commission shall refer the evidence of such crime or misconduct to the officials authorized to conduct the prosecution or to remove the public officer.

L. 1968, c. 266, §8, eff. Sept. 4, 1968.

52:9M-9. Employment of personnel; duties; compensation

The commission shall be authorized to appoint and employ and at pleasure remove an executive director, counsel, investigators, accountants, and such other persons as it may deem necessary, without regard to civil service; and to determine their duties and fix their salaries or compensation within the amounts appropriated therefor. Investigators and accountants appointed by the commission shall be and have all the powers of peace officers.

L. 1968, c. 266, §9, eff. Sept. 4, 1968.

52:9M-10. Annual report; recommendations; ~~interim~~ interim reports

The commission shall make an annual report to the Governor and Legislature which shall include its recommendations. The commission shall make such further interim reports to the Governor and Legislature, or either thereof, as it shall deem advisable, or as shall be required by the Governor or by concurrent resolution of the Legislature.

L. 1968, c. 266, §10, eff. Sept. 4, 1968.

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52:9M-11. Informing public of commissions activities

By such means and to such extent as it shall deem appropriate, the commission shall keep the public informed as to the operations of organized crime, problems of criminal law enforcement in the State and other activities of the commission. L. 1968, c. 266, §11, eff. Sept. 4, 1968.

52:9M-12. Authority of commission

With respect to the performance of its functions, duties and powers and subject to the limitation contained in paragraph d. of this section, the commission shall be authorized as follows:

a. To conduct any investigation authorized by this act at any place within the State; and to maintain offices, hold meetings and function at any place within the State as it may deem necessary;

b. To conduct private and public hearings, and to designate a member of the commission to preside over any such hearing;

c. To administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation, and require the production of any books, records, documents or other evidence it may deem relevant or material to an investigation; and the commission may designate any of its members or any member of its staff to exercise any such powers;

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d. Unless otherwise instructed by a resolution adopted by a majority of the members of the commission, every witness attending before the commission shall be examined privately and the commission shall not make public the particulars of such examination. The commission shall not have the power to take testimony at a private hearing or at a public hearing unless at least 2 of its members are present at such hearing;

e. Witnesses summoned to appear before the commission shall be entitled to receive the same fees and mileage as persons summoned to testify in the courts of the State.

L. 1968, c. 266, §12, eff. Sept. 4, 1968.

52:9M-13. Construction of sections 2 through 12 of act

Nothing contained in sections 2 through 12 of this act shall be construed to supersede, repeal or limit any power, duty or function of the Executive Department or any other department or agency of the State, or any political subdivision thereof, as prescribed or defined by law.

L. 1968, c. 266, §13, eff. Sept. 4, 1968.

52:9M-14. Cooperation and assistance of state departments and agencies

The commission may request and shall receive from every department, division, board, bureau, commission, authority or other agency created by the State, or to which the State is a party, or of any political subdivision thereof, cooperation and



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assistance in the performance of its duties.  
L. 1968, c. 266, §14, eff. Sept. 4, 1968.

52:9M-15. Disclosure of name of witness or information

Any person conducting or participating in any examination or investigation who shall disclose to any person other than the commission or an officer having the power to appoint one or more of the commissioners the name of any witness examined, or any information obtained or given upon such examination or investigation, except as directed by the Governor or commission, shall be adjudged a disorderly person.

L. 1968, c. 266, §15, eff. Sept. 4, 1968.

52:9M-16. Exhibits; Impounding by court

Upon the application of the commission, or a duly authorized member of its staff, the Superior Court or a judge thereof may impound any exhibit marked in evidence in any public or private hearing held in connection with an investigation conducted by the commission, and may order such exhibit to be retained by, or delivered to and placed in the custody of, the commission. When so impounded such exhibit shall not be taken from the custody of the commission, except upon further order of the court made upon 5 days' notice to the commission or upon its application or with its consent.

L. 1968, c. 266, §16, eff. Sept. 4, 1968.

52:9M-17. Immunity to criminal prosecution or penalty

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a. If, in the course of any investigation or hearing conducted by the commission pursuant to this act, a person refuses to answer a question or questions or produce evidence of any kind on the ground that he will be exposed to criminal prosecution or penalty or to a forfeiture of his estate thereby, the commission may order the person to answer the question or questions or produce the requested evidence and confer immunity as in this section provided. No order to answer or produce evidence with immunity shall be made except by resolution of a majority of all the members of the commission and after the Attorney General and the appropriate county prosecutor shall have been given at least 24 hours written notice of the commission's intention to issue such order and afforded an opportunity to be heard in respect to any objections they or either of them may have to the granting of immunity.

b. If upon issuance of such an order, the person complies therewith, he shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate, except that such person may nevertheless be prosecuted for any perjury committed in such answer or in producing such evidence, or for contempt for failing to give an answer or produce evidence in accordance with the order of the commission; and any such answer given or evidence produced shall be admissible against him upon any criminal investigation, proceeding or trial against him for such perjury, or

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upon any investigation, proceeding or trial against him for such contempt.

L. 1968, c. 266, §17, eff. Sept. 4, 1968.

52:9M-18. Partial Invalidity

If any section, clause or portion of this act shall be unconstitutional or be ineffective in whole or in part, to the extent that it is not unconstitutional or ineffective it shall be valid and effective and no other section, clause or provision shall on account thereof be deemed invalid or ineffective.

L. 1968, c. 266, §18, eff. Sept. 4, 1968.





69-4

Supreme Court, U.S.

FILED

JUL 15 1971

E. ROBERT SEAYER, CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1970

No. 91

**JOSEPH ARTHUR ZICARELLI,**

*Appellant,*

*vs.*

**THE NEW JERSEY STATE COMMISSION  
OF INVESTIGATION,**

*Appellee.*

**On Appeal from the Supreme Court of New Jersey**

**BRIEF OF APPELLEE, NEW JERSEY STATE  
COMMISSION OF INVESTIGATION**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

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**No. 91**

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**JOSEPH ARTHUR ZICARELLI,**

*Appellant,*

*vs.*

**THE NEW JERSEY STATE COMMISSION  
OF INVESTIGATION,**

*Appellee.*

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**On Appeal from the Supreme Court of New Jersey**

---

**BRIEF OF APPELLEE, NEW JERSEY STATE  
COMMISSION OF INVESTIGATION**

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**Questions Presented**

Appellee agrees with appellant's formulation of questions (1) and (2). Question three however, should be amended to read (3) Whether prosecution outside the United States is relevant in determining the validity of



a Fifth Amendment claim of self-incrimination. Further whether an individual who has no real or substantial fear of foreign prosecution may assert such claim.

### Statement of Case

Appellee agrees with Appellant's statement of the case. *Appellant's Brief*, at 4-8.

### Summary of Argument

Appellant's constitutional privilege against self-incrimination has been fully protected by the immunity granted him under N.J.S.A. 52:9M-17, which provides for immunity from the use of compelled answers or evidence derived therefrom, and his refusal to answer questions under this grant of immunity justified his incarceration for civil contempt until such time as he purges his contempt by answering them. While prior decisions of this Court, e.g. *Counselman v. Hitchcock*, 142 U. S. 547 (1892); *Brown v. Walker*, 161 U. S. 591 (1896) have affirmed the sufficiency of transactional immunity to replace the Fifth Amendment privilege against self-incrimination, the question of the sufficiency of "use plus fruits" immunity has never been before this Court, and therefore such an immunity configuration has never been held constitutionally infirm. *Malloy v. Hogan*, 378 U. S. 1 (1964) held that the "same standard" must determine whether a witness' silence in either federal or state proceedings is justified. *Murphy v. Waterfront Commission*, 378 U. S. 52 (1964), decided on the same day as *Malloy*, held that the immunity which the Fifth Amendment itself requires, absent an immunity grant, is "use plus fruits" by reading *Counselman*, *supra*, as so holding, and then applying the

*Malloy* "same standard" test to the facts of the case. Thus, whether the immunity granted affects a single jurisdiction or multiple jurisdictions, the question is the same, "What immunity the Fifth Amendment itself requires in exchange for compulsion to answer." *In re Zicarelli*, 55 N. J. 249 (1970). The language of the Fifth Amendment compels the "use plus fruits" or exclusionary rule standard of immunity. Since a person who invokes his privilege against self-incrimination can nonetheless be prosecuted on evidence independent of his testimony if his right to silence is honored, and since he thereby gains all the protection to which he is entitled under the Fifth Amendment, it follows that a person granted immunity (which replaces the Fifth Amendment Privilege) can not be afforded any greater protection under the Fifth Amendment than the person whose claim to silence is respected. Transactional immunity gives a person compelled to testify greater protection under the Fifth Amendment than a person who has refused to testify at all, since the transactional standard absolutely precludes any future prosecution, while the person refusing to testify may nonetheless be prosecuted on the basis of independent evidence. The transactional standard thus gives a "gratuity to crime", *Heike v. United States*, 227 U. S. 131 (1913), rather than a fair "exchange". This fact may, in turn, present a constitutional question under the "equal protection" clause of the Fourteenth Amendment, because a class of people, i.e. those who choose to remain silent, are being arbitrarily discriminated against. Under "use plus fruits" immunity there is no such problem because both the testifying witness and the non-testifying witness receive equal protection under the Fifth Amendment.

Moreover, "use plus fruits" immunity advances an exclusionary rule which suffices to replace the Fifth Amend-

ment Privilege. The earlier cases, such as *Gouinselman, supra*, and *Brown, supra*, purporting to set down the transactional immunity standard, were all decided at a time when there was no constitutional exclusionary rule or "fruit of the poisonous tree" doctrine to provide sufficient protection under the Fifth Amendment. Those cases then took an overly protective approach to provide protection in the only way then feasible, i.e. absolutely.\* But with the decisions in *Weeks v. United States*, 232 U. S. 383 (1914) laying down the exclusionary rule, and *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920), advancing the "fruit of poisonous tree" doctrine, new judicial tools were provided to insure protection of precious individual constitutional rights, while at the same time protecting the interest of the government. To date, this exclusionary rule has been effectively used in the area of the Fourth Amendment, *Weeks, supra*, and *Mapp v. Ohio*, 367 U. S. 643 (1961) (applying the *Weeks* doctrine against the states) and the Sixth Amendment, *Massiah v. United States*, 377 U. S. 201 (1964) and *McLeod v. Ohio*, 381 U. S. 356 (1965) (applying the *Massiah* rule against the states). There is no reason why a similar approach and an analogous rule cannot be court-developed in the area of Fifth Amendment protection. In fact, this Court has indicated a willingness to impose use restrictions in the Fifth Amendment area, saying that completely barring future prosecution would "increase to an intolerable degree interference with the public interest in having the guilty brought to book." *Blue v. United States*, 384 U. S. 251 (1966). In cases involving federal regulation of potentially incriminating areas of conduct, this Court has found the concept of use restrictions placed on information so gathered "in principle an attractive and apparently practical resolution of the . . . problem . . ."

*Marchetti v. United States*, 390 U. S. 39 (1968). And since the government has the heavy burden of showing absence of taint in any prosecution touching matters testified to under immunity, and since courts have tools available to make this burden, in practical effect, as heavy as they deem necessary to be commensurate with the protection afforded by the Fifth Amendment, the individual will be fully protected under the exclusionary rule standard.

In addition, practical difficulties inhere in the transactional immunity test. Since only prosecutions based upon transactions connected "in a substantial way" with testimony given under transactional immunity are barred, *Heike v. United States, supra*, the defendant may have enormous pragmatic problems in showing that this relationship exists. The need for defendants to make such showings will also increase the number of court hearings and further congest already crowded court dockets. Further, greater amounts of testimony will be given under "use plus fruits" immunity, and it will be more probative than testimony given under transactional immunity. This best balances the public's need for every man's evidence with the individual's right not to be a witness against himself. Furthermore, respect for law is fostered by a rule under which the government fairly "exchanges" protection against "use plus fruits" for compelled testimony, as opposed to a wastefully broad rule whereby the government gives a "gratuity to crime" by, in effect, condemning action on the one hand, and completely pardoning it on the other hand. In addition, the "use plus fruits" concept avoids possible conflict with the Sixth Amendment rights of "confrontation" and "compulsory process", whereas the transactional standard increases the likelihood of such conflicts. Finally, as this Court



well knows, the Congress, in response to a four year federal study, has recently passed such a statute to replace virtually all heretofore existing federal immunity statutes.

The requirement for responsive answers and evidence is constitutional as it merely requires that which the witness "in good faith" believes the government demanded. Moreover, this Court's own test as to what is self-incriminatory was formulated by using the language "responsive answers", *Hoffman v. United States*, 341 U. S. 479, 486 (1951); *Malloy v. Hogan*, 378 U. S. 1 (1964). There can be no better assurance of the constitutionality of such a term than its appearance in the very test this Court promulgated with respect to self-incrimination. Thus, the lower court's ruling that the demand for responsive answers poses no constitutional difficulty, is obviously correct.

Fear of foreign, i.e. extra-United States prosecution is not relevant in determining the validity of a Fifth Amendment claim of self-incrimination *Murphy v. Waterfront Commission*, 378 U. S. 52 (1964); *In re Parker*, 411 F. 2d 1067 (10th Cir. 1969). Furthermore, appellant made no showing whatever in the Court below that his fear of foreign prosecution was real. In fact he has answered no questions at all and admits that no questions were ever asked which related to possible foreign criminality. On the contrary then, all the evidence indicates this fear is unreal and imaginary, *Brown v. Walker*, *supra*. Moreover, apprehension of prosecution in Canada is misplaced. That country long ago adopted, in effect, a *Murphy* rule which fully protects any person compelled to incriminate himself; even outside of Canada, by barring use of such testimony in any Canadian proceeding. *Prosko v. Rex*, 63 S.C.R. 226 (Sup. Ct. Canada 1926).

Therefore, even if fear of foreign prosecution is relevant and real, which it is not, appellant runs no risk of foreign prosecution in Canada. Thus appellant's contention that his claim to silence should have been honored is totally without merit.

## POINT I

Appellant's incarceration for civil contempt pursuant to an immunity statute which grants immunity from the subsequent use of compelled testimony and any fruits thereof, but which fails to grant absolute immunity from prosecution, affords a constitutional protection adequate to warrant the compulsion of his testimony.

A. Prior decisions of this Court have reaffirmed the sufficiency of transactional immunity to replace the Fifth Amendment. However, this Court has never tested the constitutional sufficiency of a "use plus fruits" immunity statute, and therefore has never held such a statute constitutionally infirm.

(1) *Pre-Murphy v. Waterfront Commission of New York Harbor*, 378 U. S. 52 (1964).

The first case to deal with a federal witness immunity statute was *Counselman v. Hitchcock*, 142 U. S. 547 (1892). In that case Counselman, a grain shipper, was subpoenaed as a witness to appear before a federal grand jury to answer certain questions pertaining to alleged violations of the Interstate Commerce Act. He refused to answer on the basis of self-incrimination. After being directed to answer by the court, and persisting in his refusal, he was adjudged in contempt. Rev. Stat. §860, 15 Stat. 37 (1868) provided as follows:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty, or forfeiture: provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

After rejecting the Government's contention that the Fifth Amendment privilege was inapplicable to a witness before a grand jury, the Court also overruled the claim that §860 gave protection adequate to warrant the compulsion of incriminating evidence. While the statute forbade use of the compelled testimony itself in any court of the United States,

"[i]t could not, and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

The protection of Rev. Stat. §860 was therefore "not co-extensive with the constitutional provision." 142 U. S. at 564-565.

This holding could and should have ended the case. However, the Justices felt constrained to review prior decisions and stated at 142 U. S. at 585:

"We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

After all this the opinion closed on the more subdued theme earlier enunciated:

"Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom from a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party." Ibid., at 586.

*Counselman* advanced several important propositions. It held, for example, that the protection of the Fifth Amendment extends to a witness called to testify before a grand jury, and is not limited to cases of criminal prosecution against the witness himself. As the court stated:

"The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard." 142 U. S. at 562.



Further, the case held that to be valid, a statute must afford protection *co-extensive* with the Fifth Amendment, *Id.* at 565, thus paving the way for future legislative enactments which could be construed as co-extensive with the rights afforded by the Fifth Amendment. Finally, and most specifically, the Court held that §860, a mere use immunity statute, which could not protect a person against future prosecution based on leads derived from his compelled testimony, was not sufficient to replace the Fifth Amendment.

Faced with two criticisms of Rev. Stat. §860, one that it could not protect against prosecution based on leads derived from compelled testimony, the other that it did not afford absolute immunity against future prosecution, the Congress decided to play it safe. In 1893, it passed, in response to *Counselman, supra*, a more broadly phrased "transactional" immunity statute which provided:

"But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise . . ." Act of February 11, 1893, c. 83, 27 Stat. 443 (1893).

Shortly thereafter, the constitutionality of this enactment was challenged. In *Brown v. Walker*, 161 U. S. 591 (1896), an auditor of a railway company was called before a grand jury probing alleged violations of interstate commerce regulations. Brown was questioned, refused to answer on the basis of self-incrimination, and was then ordered to answer by the court. He again refused to answer and was held in contempt. The Court affirmed Brown's contempt citation and sustained the constitution-

ality of the "transactional" immunity statute before it, citing *Counselman, supra*, as its primary authority. *Id.*, at 594-595. In *Brown, supra*, the sole issue before the court was the validity of a *transactional* immunity statute. In sustaining that statute the court merely decided that transactional immunity was sufficient. The decision therefore did not hold that *only* transactional immunity would suffice to achieve this end, but rather that it did in fact suffice. Thus, the holding in *Brown* never reached the precise issue presented in this appeal.

The next case to deal with this problem was *Hale v. Henkel*, 201 U. S. 43 (1906). Here again the court was asked to decide whether transactional immunity was sufficient and additionally whether the threat of prosecution in a foreign jurisdiction undermined any grant of federal immunity. Citing *Brown, supra*, the court disposed of both issues in favor of the grant of immunity. The decision in *Hale* in no way intimated that a lesser immunity grant would not suffice to replace the Fifth Amendment. It merely reiterated the then established rule that transactional immunity did suffice to achieve that end.

All other cases cited by appellant in support of the proposition that the Fifth Amendment *requires* nothing less than transactional immunity suffer from similar deficiencies. *McCarthy v. Arndstein*, 266 U. S. 34 (1924), for example, stands for the proposition that the constitutional privilege against self-incrimination applies to civil as well as to criminal proceedings, and more specifically that the privilege was applicable to an examination of a bankrupt and his wife under the then existing bankruptcy act for the purpose of obtaining possession of property belonging to his estate. *Id.*, at 39-41. *United States v. Murdock*, 284 U. S. 141. (1931) held that "immunity

against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him. . . ." Id. at 149. In *Smith v. United States*, 337 U. S. 137 (1949), the Court dealt with a transactional immunity statute which, by its terms, required a witness to claim his privilege rather than granting him immunity automatically. The issue before the Court was whether a certain response by the witness to a question put to him by the government constituted a waiver of a previous definite claim of general privilege against self-incrimination. Ibid., at 150-152. Again, in *Smith*, the sufficiency of a "use plus fruits" statute was not presented, and its holding in no way reflected an opinion as to that question. In *United States v. Bryan*, 339 U. S. 323 (1950), a witness called before a House Committee willfully and deliberately failed to produce books and records called for in subpoenas issued by the Committee on the grounds that a quorum of the Committee was not present at the time the documents were to be produced. She further claimed that any testimony she did give could not subsequently be read to a jury trying her for contempt, because the immunity statute involved protected her against future use of her testimony in any criminal proceeding. The immunity involved was a mere "use" immunity, 18 U. S. C. §3486, similar to the statute struck down as insufficient in *Counselman*. The question of the necessary scope of immunity to be co-extensive with the Fifth Amendment was not raised by either issue in the case, and therefore was not before the Court. And, once again, the Court's holding in *Bryan* in no way reflected an opinion as to that issue.

More recently, in *Ullman v. United States*, 350 U. S. 422 (1956), the Court had occasion to reconsider the con-

stitutionality of a transactional immunity statute. The Immunity Act of 1954, 68 Stat. 745, 18 U. S. C. (Supp. II), §3486, 18 U. S. C. A. §3486 provided in pertinent part:

"But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence; nor shall testimony so compelled be used as evidence in any criminal proceeding . . ."

The Court explicitly stated that the statute before it was "a similar Act" to the one considered in *Brown v. Walker*, *supra*. Id. at 429. In upholding the constitutionality of the statute before it, primarily on the basis of *Brown*, the Court once again reiterated the sufficiency of transactional immunity to replace the Fifth Amendment privilege. And again, since *Brown* and *Ullmann* upheld the constitutionality of transactional immunity statutes, these opinions should be read as supporting that proposition, and only that proposition. Further, appellee Commission agrees with Mr. Justice Frankfurter's statement in *Ullmann*. Id at 438:

"The 1893 statute [granting transactional immunity] has become part of our constitutional fabric."

But agreeing with this conclusion in no way compels the conclusion appellant extracts from it, i.e. that transactional immunity is the *only* type which suffices to supplant the Fifth Amendment privilege against self-incrimination. It is possible, as will be shown throughout this brief, that a lesser form of immunity will fully suffice to



achieve that end. *United States v. Monia*, 317 U. S. 424 (1943) offers only little more. In *Monia* the issue before the Court was whether a transactional immunity statute was "automatic" in its operation or whether the witness had to claim his privilege under the statute. This question obviously did not raise the issue of the minimum scope necessary for an immunity statute to be valid, the issue is the instant case.

It is clear therefore that cases cited by Appellant in support of the necessity of transactional immunity do not, upon close analysis, support that view at all. Furthermore, it is a cardinal rule of constitutional adjudication that courts will not formulate a rule of constitutional law broader than is absolutely necessary and required by the precise facts to which it is to be applied. *Harmon v. Bruckner*, 355 U. S. 579 (1958); *Sweatt v. Painter*, 339 U. S. 629 (1950); *Rescue Army v. Municipal Court*, 331 U. S. 549 (1947); *Texas v. Grandstrom*, 404 F. 2d 644 (5th Cir., 1968). It is respectfully submitted that the cases discussed thus far should be read in this salutary light. And a careful reading of each leads to the ineluctable conclusion that as of the time *Ullmann, supra*, was decided, the precise issue drawn in the instant case was neither ever before this honorable Court nor ever definitively answered by it.

**(2) *Murphy v. Waterfront Commission of N. Y. Harbor and Beyond.***

As stated before, the specific holding in *Counselman v. Hitchcock, supra*, was that a mere "use" immunity statute alone was not sufficient to replace the Fifth Amendment privilege (Appellee's Brief, at 10). The reason for that holding, however, is not facially apparent. On the one

hand, the holding could have been posited on the theory that, since the immunity statute "could not prevent the obtaining and use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion and on which he could be convicted . . ." 142 U. S. at 564-565, it was constitutionally defective. On the other hand, the holding could also have been predicated on the theory that, in any event, ". . . a statutory enactment, to be valid, must afford absolute immunity against future prosecution. . . ." 142 U. S. at 585-586. Subsequent cases up to *Ullmann, supra*, dealing with the sufficiency of grants of immunity read *Counselman* as espousing the latter, rather than the former theory. However, in *Malloy v. Hogan*, 378 U. S. 1 (1964), the Court held that "the same standards must determine whether [a witness'] silence in either federal or state proceedings is justified." *Ibid.*, at 11, and applied the Fifth Amendment privilege against self-incrimination against the states through the Fourteenth Amendment "due process" clause. On the same day, in *Murphy v. Waterfront Commission of New York Harbor*, 378 U. S. 52 (1964), the Court was faced with the problem of what protection the Fifth Amendment afforded a state witness who was granted transactional immunity from state prosecution against possible federal incrimination. As the Court phrased the question:

"Since a grant of immunity is valid only if it is co-extensive with the scope of the privilege against self-incrimination, *Counselman v. Hitchcock*, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110, we must now decide the fundamental constitutional question of whether, absent as immunity provision, one jurisdiction in our federal structure may compel a witness to give testimony which might incriminate

him under the laws of another jurisdiction." 378 U. S. at 54.

In answer to this question the Court maintained:

"We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." 378 U. S. at 77-78.

The Court then went on to "... decide what effect this holding has on existing state immunity legislation. ..."

378 U. S. at 78.

There followed a discussion as to the holding in *Counselman, supra*. The Court conspicuously cited the "use plus fruits" language from *Counselman*, and avoided the broader absolute or transactional language. Thus, the *Murphy* Court said of *Counselman, supra*, that:

"... the Court upheld appellant's refusal to answer on the ground that the statute:

'could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. \* \* \* id., 142 U. S. at 564, 12 S. Ct., at 198,

that it:

'could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted. \* \* \* ibid.,

and that it:

'affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.' Id., 142 U. S., at 586, 12 S. Ct., at 206." 378 U. S. at 78-79.

The Court then went on to elaborate on the holding quoted above, asserting:

"... we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." 378 U. S. at 79.

The Court added this significant footnote to that holding:

"Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters



related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 378 U. S. at 79 n. 18.

From the point of view of hindsight, in applying the holding of *Counselman*, *supra*, to the holding that the privilege against self-incrimination protects a state witness against federal prosecution, and that the "same standard" must determine whether silence in either a federal or state proceeding is justified, *Malloy v. Hogan*, *supra*, at 11, the *Murphy* court had several ways in which to harmonize its holding with *Counselman*. Essentially, these alternatives were three:

(1) The Court could read *Counselman* as mandating transactional immunity in both the compelling and non-compelling jurisdiction and applying this broad standard to the facts presented.

(2) It could read *Counselman* as mandating transactional immunity within the compelling jurisdiction, while asserting that, for reasons of federalism, the non-compelling jurisdiction need only be precluded from use of compelled testimony or its fruits, and

(3) It could read *Counselman* as mandating a minimum of "use-fruits" immunity in both the compelling and non-compelling jurisdictions, and applying this "same standard" to the facts presented.

The Court peremptorily rejected the first choice as untenable in view of law enforcement prerogatives. As Mr. Justice White said in his concurring opinion:

"But such a rule" [of transactional immunity] would invalidate the immunity statutes of the 50

States since the States are without authority to confer immunity from federal prosecutions and would thereby cut deeply and significantly into traditional and important areas of state authority and responsibility in our federal system." 378 U. S. at 93.

As to the second choice, the position advanced by appellant, namely *Murphy, supra*, held that only "use-fruits" immunity was necessary in a cross-jurisdiction situation. "Out of considerations of federalism" (*Appellant's Brief*, at 19), it seems clear that for *Murphy* to have so read *Counselman, supra*, necessitates the postulation of a theory other than the Fifth Amendment on which to support of this elusive concept of "federalism." For the Fifth Amendment certainly does not by its own terms, support it, and *Malloy, supra*, does not compel it. Appellant contends that under this theory, *Murphy*, read with *Malloy, supra*, "... broadened rather than restricted the protection of the Fifth Amendment's privilege against self-incrimination." *Appellant's Brief* at 18. It is true that *Malloy, supra*, broadened the application of the Fifth Amendment privilege against self-incrimination, but this extension in no way depends upon the holding in *Murphy*; on the contrary *Malloy* broadened the privilege, in the sense in which appellant uses the term "broadened", *ex proprio vigore*. Thus, the *Murphy* court quoted from *Adams v. Maryland*, 347 U. S. 179 (1954):

"... a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute. ..." 378 U. S., at 75-76.

And since *Malloy, supra*, extended the protections of the Fifth Amendment against the States, the language quoted above would apply with equal force in either a state or federal setting. Thus, the protections of the Fifth Amendment had already been broadened before *Murphy* was decided. The task in *Murphy* was to enunciate *how* the operation of the Fifth Amendment was to be applied in the factual circumstances before the Court. *Murphy* held that the Fifth Amendment itself operates to bind the federal government, i.e. absent an immunity statute, and that therefore the federal government could not use compelled testimony or its fruits in a subsequent prosecution of a witness granted state immunity. Stated another way, the Court held that the Fifth Amendment itself required "use plus fruits" immunity.

The above suggests that the Court based their decision not on some theory which, when coupled with the Fifth Amendment, allows two separate scopes of immunity to replace the Fifth Amendment, depending upon the witness' position vis à vis the compelling or non-compelling jurisdiction, but rather on the theory of what is required of the Fifth Amendment itself, without any external theoretical support. This corresponds to the third choice open to the Court. Thus *Murphy* could have read *Counselman*, as appellee contends the Court did in fact read it, as requiring only "use plus fruits" immunity, and thereby merely followed the aegis of *Malloy* by applying the "same standard" which it read *Counselman* as setting down 70 years earlier. Under this analysis, there is no necessity either to imply conflicts between the decisions in *Counselman* and *Murphy* or to postulate any theory other than the Fifth Amendment itself to arrive at the conclusion reached by the *Murphy* court. Thus, the third approach provides a more logical and symmetrical method of solving the

problems faced by both courts and also avoids suggestion of unnecessary conflict between them. It is appellee's contention that it is on this latter theory that the *Murphy* decision was based.

That this Court still remained troubled by the immunity question, however, cannot be gainsaid. In *Albertson v. Subversive Activities Control Board*, 382 U. S. 70 (1965), the Court held that the immunity granted by §4(f) of the Subversive Activities Control Act of 1950, 64 Stat. 992, 50 U.S.C. §783(f) was invalid because "[i]t does not preclude any use of the information called for . . . , either as evidence or as an investigatory lead." *Ibid.*, at 80. The Court cited *Counselman*, *supra*, as requiring "absolute immunity against future prosecution . . .", but it is clear that the statute before the Court in *Albertson*, *supra* was substantively identical with the statute before the Court in *Counselman*, *supra*. Thus, the focus of the decision was on the fact that the immunity statute in *Albertson*, *supra*, granted mere use immunity and was therefore held not constitutionally sufficient. Presumably *Albertson*, therefore, throws no greater light on the instant controversy than did *Counselman*, since it merely presented a series of facts which no more compelled a decision as to whether "use plus fruits" immunity is constitutionally sufficient than did *Counselman* itself. And in *Stevens v. Marks*, 383 U. S. 234 (1966), the Court, per Mr. Justice Douglas, *Ibid.*, at 244-245, and Mr. Justice Harlan, concurring in part and dissenting in part, *Ibid.*, at 249-250, indicated that the necessary scope of immunity question was still unresolved.

Most recently, three decisions have been handed down which further intensify the instant controversy. In *In the Matter of the Grand Jury Testimony of Joanne Kinoy*,



— F. Supp. — (D. C. S. D. N. Y. 1971), the Court struck down the New Federal Witness Immunity Statute, Title II of the Organized Crime Control Act of 1970, 18 U. S. C. §§6001-6003 which is very similar to the instant statute. 18 U.S.C. §6002 provides in relevant part:

“... no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.”

The Court claimed that *Counselman v. Hitchcock*, *supra* in its view, had not been specifically overruled and that consequently a District Court had no power to reverse it. In the Court's own words:

“Since the Supreme Court has not overruled its requirement that as between the questioning sovereign and the witness only an immunity statute granting transactional immunity is sufficiently broad to replace the constitutional privilege, this court is without power to do so.” *In re Joanne Kinnoy*, Slip opinion, February 1, 1971, at 33.

Thereafter, the Ninth Circuit upheld the constitutionality of §6002 in *Stewart and Kastigar v. United States*, No. 71-1212, 1213 (9th Cir., March 29, 1971).

The Court maintained:

“There appears to be no question but that a ‘transaction’ statute affords the protection that the Fifth Amendment requires. Here we examine a different statute to determine whether it also may be constitutional. We find that it is.

No case has been cited in which the Supreme Court has held that *only* a transaction statute will suffice, and we have found none. On the contrary, it appears that *Murphy v. Waterfront Commission of New York Harbor*, 378 U. S. 52 (1964), has decided the issue here both with respect to the scope of *Counselman* and also with respect to the extent of the requirements of the Fifth Amendment—at least as the latter apply here.”

In *Murphy* the Court considered *Counselman* and then stated the rule to be:

“[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.” 378 U. S. at 79.

The Court added this significant footnote:

“Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.” 378 U. S. at 79 n. 18.

It seems apparent this footnote that the Court does not believe that the immunized testimony must bar all prosecution for the “transaction” about which he testified. Rather, the Court makes clear that any evidence used must be free from all taint of compulsion. There

must be an "independent legitimate source" for it other than from that evidence produced by the witness under compulsion and its fruits.

The statute now under question appears clearly within the protective limitations of the Fifth Amendment as construed by *Murphy*. It proscribes the use of the testimony "or other information" compelled, together with "any information directly or indirectly derived from such testimony or other information." See also *Zicarelli v. New Jersey State Commission of Investigation*, 55 N. J. 249 (1970); 261 A. 2d 129, 137-40 (1970), Prob. juris. noted, 39 U.S.L.W. 3375 (U. S. March 2, 1971) (No. 91)."

In an even more recent case however, *In re Korman*, No. 71-1328 (7th Cir., May 24, 1971), the Seventh Circuit held §6002 unconstitutional, disagreeing with the Ninth Circuit's opinion that *Murphy, supra*, had relaxed the *Counselman* transactional immunity standard.

As of today therefore, the co-extensiveness test set forth in *Counselman, supra*, remains unimpaired and firmly embedded in our jurisprudence. The question remains whether transactional immunity is required to meet that test or whether "use plus fruits" immunity will suffice to achieve that end.

**B. The language of the Fifth Amendment and the values and policies which it serves are fully vindicated by the instant "use plus fruits" immunity statute.**

**(1) The language of the Fifth Amendment compels the "use plus fruits" standard.**

The Fifth Amendment states:

"No person . . . shall be compelled in any criminal case to be a witness against himself."

Logically, the Fifth Amendment requires that any rule designed to supplant it leave the individual in no worse posture than if his claim to silence based upon the amendment had been sustained. Thus, in hypothetical (a), if X, a witness, invokes his claim to Fifth Amendment protection and that claim is sustained, then he is as fully protected by the Fifth Amendment as is possible. In hypothetical (b) however, if Y, a witness, refuses to answer incriminating questions but is tendered an immunity to supplant his Fifth Amendment privilege, it follows that he must be afforded protection under that immunity fully co-extensive with the protection which X, above, obtained by remaining silent, i.e. the protection of the Fifth Amendment itself. It is clear that to postulate a Fifth Amendment protection in hypothetical (a) which would absolutely preclude prosecution of X as to the charge against him would be absurd. This follows from the fact that the government in (a) may prosecute X, on the basis of other lawfully-acquired independent evidence which it may have amassed against X. If this be so, then in hypothetical (b), the immunity granted Y, to be fully co-extensive with the Fifth Amendment itself, can proceed no further than to bar the use of Y's compelled testimony and any fruits derived therefrom. As Chief Justice Weintraub observed in *In re Zicarelli*, 261 A. 2d 129, 55 N. J. 249, 267 (1970):

"On the face of things, an immunity from prosecution would exceed what the Fifth Amendment protects, for the Fifth Amendment protects the witness only with respect to what the witness himself can furnish and not from evidence from other sources."

Thus, to require transactional immunity in situation (b) would be to place Y in a *better* position vis-a-vis the gov-



ernment compelling his testimony than X would be with respect to the same government. Under the transactional immunity standard, Y would become absolutely immune from future prosecution for the offense to which the questions relate, while X could still be prosecuted on the basis of independent evidence. This situation in turn poses serious difficulties under the "equal protection" clause of the Fourteenth Amendment. For it is difficult to rationalize the different treatment of X and Y above under the same constitutional provision without running afoul of that clause.

The drama of this anomalous situation is heightened in the following hypothetical: A assaults B, is arrested by C and is charged with the offense. Upon being released on bond, A attempts to bribe C to dispose of the implements used in the assault. C, an honest police officer, reports the attempt to the prosecutor. A is then tried, convicted and sentenced for the assault. One year later, A is subpoenaed before a grand jury investigating certain alleged conspiracies. He is granted immunity in exchange for his testimony, which deals exclusively with his assault on B. Then C is called before the same grand jury and testifies as to A's attempted bribe. The grand jury then returns a true bill against A for the attempted bribery. A essays to set up his testimony under immunity before the grand jury as a plea in bar to prosecution. The question is whether the immunity granted is a good defense. It is clear, under these circumstances that there was an independent, *prima facie* case for attempted bribery made at the time when A attempted to bribe C and C reported the attempt to the prosecutor. Further, C was called before the grand jury a year subsequent to the bribery attempt and testified under the immunity grant only with respect to the assault he per-

petrated on B. It is also clear that C's testimony before the grand jury was based upon the actual bribery attempt made by A one year prior to either A's or C's appearance before the grand jury. It is likewise patent that, had A never been summoned before the grand jury and never been granted immunity, with respect to the attempted bribery charge he could have been prosecuted on the basis of independent evidence, and his right to remain silent under the Fifth Amendment would not and could not have been a bar to that prosecution. Further, following the analysis of the hypotheticals above, A, having testified before the grand jury under a grant of immunity, should be in no better position than if he had not been compelled to testify at all. Accordingly, if A can be prosecuted on the basis of independent evidence when his Fifth Amendment claim was sustained, then there is no compelling reason why he should not be prosecuted on the same basis i.e. independent evidence, after a grant of immunity. The terms of the Fifth Amendment can mean no less. But they should not be construed to mean more. A person should not be allowed to claim *greater* protection under a grant of immunity than the Fifth Amendment itself affords. Yet this contradictory position is advanced by Appellant, when he quotes from *Piccirillo v. New York*, — U. S. —, 27 L. Ed. 2d 596, 606 (1971), Mr. Justice Brennan, dissenting: "[with respect to the words of the privilege . . . the self-incrimination clause] prohibits the application vel non of compulsion to an individual to force testimony which incriminates him, regardless of whether he is ever prosecuted." (citation omitted). Since the reach of the privilege is the *possibility of a criminal charge* and not whether one is in fact brought, it is *only when there is no possibility of a criminal case* that the privilege ceases to apply (*Appellant's Brief*, at 21). Appellant goes on to quote, "the fact that the criminal case may not be based upon that

compelled testimony does not avoid the problem. The individual is "still being forced by the State to admit criminal conduct for which he may be punished, albeit not on the basis of his compelled testimony." Thus, use immunity "permits the compulsion without removing the criminality." Ibid.

The fallacy in this argument is that begs the entire question of the scope of immunity necessary under the Fifth Amendment. The reasoning is circular. It assumes its conclusion i.e. that only transaction immunity can replace the Fifth Amendment, and then proceeds to conclude its assumption i.e. therefore only transactional immunity will suffice. Thus far it is merely a tautology based upon a predetermined conclusion. Further, the argument is elliptical. It begins, "since the reach of the privilege", which it says, is the "possibility of a criminal charge . . .", it is only when there "is no possibility of a criminal case that the privilege ceases to apply." But the language of the Fifth Amendment will not support such analysis. By its own terms it says that "No person . . . shall be compelled in any criminal case *to be a witness against himself*." Thus, the argument should properly read—since the reach of the privilege is the possibility of a criminal charge *based upon evidence or testimony compelled . . .*, it is only when there is no possibility of a criminal case based upon evidence or testimony compelled that the privilege ceases to apply.

As long as there is no casual connection between the compelled testimony and a subsequent prosecution "relating to that very testimony" i.e. as long as the State's case is based on sources completely independent of the compelled testimony, there is no good reason or policy not to let it proceed. And the statement that "the individual is still being forced by the State to admit criminal con-

duct for which he may be punished, albeit not on the basis of his compelled company" scarcely adds any weights to this otherwise bouyant argument. For as long as the person "shall not be compelled . . . *to be a witness against himself*" i.e. by bearing compulsory witness to his offense and then being prosecuted on that, or some derivative basis, the language of the Fifth Amendment is amply satisfied. The concluding passage that use immunity "permits the compulsion without removing the criminality", places "compulsion" and "criminality" on intersecting rather than parallel planes, and thus sets an unnecessary collision course between two factually unrelated phenomenon. To further the analogy properly, it is not the "compulsion", but rather the *use* of testimony compelled which is on a collision course with "criminality." See *Murphy v. Waterfront Commission*, *supra* at 107 (Mr. Justice White, concurring):

"The real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminatory testimony was that thought to in here in *using* a man's compelled testimony to punish him. *Feldman v. United States*, 322 U. S. 487, 500, 64 S. Ct. 1082, 1088 (Black, J., dissenting)." (Emphasis added.)

- (2) ***The instant "use plus fruits" immunity statute advances an exclusionary rule which fully replaces the Fifth Amendment privilege against self-incrimination.***

Any discussion of "use plus fruits" immunity or, more precisely, the exclusionary rule concept in the Fifth



Amendment area<sup>1</sup> must begin with a brief discussion of cases leading to the formulation of the established exclu-

<sup>1</sup> The Fifth Amendment seems to carry a stricter rule of exclusion within its own terms than, for example, the Fourth Amendment. Thus, the language of the Fifth Amendment, "No persons shall be compelled in any criminal case to be a witness against himself", signifies that all compulsion by the government used to make a person incriminate himself is *ipso facto*, proscribed. But, the emphasis is placed on the *use* rather than the compulsion of incriminating testimony. Thus, it is said:

"And history supports no argument that the framers of the Fifth Amendment were interested only in forbidding the *extraction* of an accused's testimony, as distinguished from the *use* of his extracted testimony. The extraction of testimony is, of course, but a means to the end of its use to punish. . . . The real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminating testimony was that thought to inhere in using a man's compelled testimony to punish him." *Feldman v. United States*, 322 U. S. 487, 499-500 (1944), (Black, J., dissenting), cited with approval in *Murphy v. Waterfront Commission of New York Harbor*, 378 U. S. 52, 107 (1964), White, J. concurring.

Thus, the real focus of the Fifth Amendment is on *use* of compelled testimony, rather than on the *compulsion* of that testimony, which is but a means to the end of use itself. In this sense, the Fifth Amendment exclusionary rule designed to *supplant* the Fifth Amendment itself, may be stricter in its operation than the Fourth Amendment exclusionary rule which is designed to *deter* certain types of unlawful governmental activity, to wit, "unreasonable searches and seizures". The upshot of the Fourth Amendment exclusion, with its underlying rationale of deterrence of unlawful police activity, is thus not the preclusion of all use of illegal evidence to protect the individual, but rather "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. *Mapp v. Ohio*, 367 U. S. 643, 656 (1961). See also *Elkins v. United States*, 364 U. S. 206, 217 (1960), and *Note, Scope of Taint Under the Exclusionary Rule of the Fifth Amendment Privilege Against Self-Incrimination*, 114 U. Pa. L. Rev. 570 (1966).

sionary rule in the Fourth Amendment area. In the landmark case of *Boyd v. United States*, 116 U. S. 616 (1886), the Court noted the strong interrelationship between the Fourth and Fifth Amendments. The Court said:

"It is not the breaking of . . . doors and the rumaging of drawers, that constitutes the essence of the offense; but is the invasion of (the) indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited . . . which constitutes the essence of (the violation of the Fourth Amendment). Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation (of the Fourth Amendment). In this regard the Fourth and Fifth Amendments run almost into each other." 116 U. S. at 630.

In striking down the statute before it as violating the spirit of both the Fourth and Fifth Amendments, the Court continued *supra* at 633:

"We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seiz-

ure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

The *Boyd* Court dealt with a constitutional question, to wit, the constitutionality of a section of a federal revenue statute,\* the resolution of which was based on the con-

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\* Act of June 22, 1874, § 5, 18 Stat. 187 which reads:

"In all suits and proceedings other than criminal, arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business book, invoice, or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced the said attorney shall be permitted, under the direction of the court, to

(Footnote continued on following page)

current operation of the Fourth and Fifth Amendments. While the constitutional basis for the Fourth Amendment exclusionary rule is predicated upon this interrelationship,<sup>3</sup> "(t)he interrelationship between the Fourth and Fifth Amendments in this area (i.e. of Fourth Amendment exclusion) does not, of course, justify a narrowing in the interpretation of either of these Amendments with respect to areas in which they operate separately." *Mapp v. Ohio*, 367 U. S. 643, 662 (Black, J., concurring). *Boyd, supra*, was followed by *Counselman v. Hitchcock, supra*, which relied on the authority and language of *Boyd*,<sup>4</sup> to support its conclusion. The *Counselman* Court concluded its opinion by stating:

"... an we consider that the ruling on this court in *Boyd v. United States, supra*, supports the view we take," 142 U. S. at 586.

But the decision in *Counselman* rested on the Fifth Amendment as it operates in its *own separate* sphere, and not on the interrelationship between the Fourth and Fifth

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(Footnote continued from preceding page)

make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid."

<sup>3</sup> *Weeks v. United States*, 232 U. S. 383, 398 (1914); *Mapp v. Ohio*, 367 U. S. 643, 660 (1961).

<sup>4</sup> 142 U. S. at 580-582, 586.



Amendments. The subsequent decisions of *Brown v. Walker, supra*, and *Hale v. Henkel, supra*, followed in the wake of *Boyd* and *Counselman* to establish the transactional immunity standard. The importance of these observations is that, at the time the question of the necessary scope of immunity to supplant the Fifth Amendment privilege arose in the cases above, there was no existing rule of exclusion<sup>5</sup> available to the courts to effectively safeguard the protections afforded by the Fourth and/or Fifth Amendments.<sup>6</sup> And the alternatives available to

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<sup>5</sup> The Fourth Amendment exclusionary rule was first enunciated as a rule of constitutional law in *Weeks v. United States*, 232 U. S. 383 (1914). *Weeks, supra*, involved the taking of certain documents by a federal officer without a warrant. These documents were admitted at defendant's trial, over his seasonable application for their return. *Held* that the use of the seized evidence involved "a denial of the constitutional rights of the accused." *Ibid.*, at 398. The Fourth Amendment was first applied against the States in *Wolf v. Colorado*, 338 U. S. 25 (1949), but the *Wolf* court declined to extend to the States the *Weeks* exclusionary rule. *Ibid.*, at 33. It was not until *Mapp v. Ohio*, 367 U. S. 643 (1961) that the court extended the *Weeks* rule of exclusion to the States.

<sup>6</sup> As late as *Adams v. New York*, 192 U. S. 585, 594-598 (1904), the court still adhered to competency and relevancy rules as governing the admissibility of evidence at trial. The court stated the then accepted rule:

"It may be mentioned in this place that through papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question." 192 U. S. at 595.

courts at that time to protect constitutional rights, for example, by way of voiding unconstitutional statutes<sup>7</sup> or providing for private redress by way of common law actions against the violators of these rights,<sup>8</sup> proved to be more illusory than real.<sup>9</sup> Accordingly, Courts solicitous of protecting the individual against unwarranted governmental invasions, were hard-pressed for an acceptable solvent to the problem prior to the creation of the exclusionary rule. The tact taken by the Court from the time of *Counselman* until the adoption of the exclusionary rule to resolve the Fifth Amendment immunity dilemma was perforce heavy-handed, if not justifiable, in light of the dearth of tools then available to solve said problem. Accordingly, the transactional immunity standard putatively set down by *Counselman* reflected an attitude of over-protection at a time when the alternative solution to this problem was insufficient protection.

The instant statute,<sup>10</sup> however, reflects a careful imple-

<sup>7</sup> *Boyd v. United States*, *supra*.

<sup>8</sup> See *Wolf v. Colorado*, 338 U. S. 25, 30 n. 1.

<sup>9</sup> See *Mapp v. Ohio*, *supra*.

<sup>10</sup> New Jersey Statutes Annotated, Title 52, Chapter 9M, Section 17 (L. 1968, c. 266, § 17)—provides:

"a. If, in the course of any investigation or hearing conducted by the commission pursuant to this act [chapter], a person refuses to answer a question or questions or produce evidence of any kind on the ground that he will be exposed to criminal prosecution or penalty or to a forfeiture of his estate thereby, the commission may order the person to answer the question or questions or

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mentation of the exclusionary rule, which gained initial recognition in *Weeks v. United States*, 232 U. S. 383 (1914), and was subsequently applied against state action in *Mapp v. Ohio*, 367 U. S. 643 (1961). Thus, from the time of inception, the rule of exclusion has had, to date, almost 60 years to mature and develop. Through those years the above rule has been expanded and refined through the "fruit of the poisonous tree" doctrine, first enunciated in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920) and subsequently developed in *Nardone v. United States*, 308 U. S. 338 (1939) and most recently modified in *Wong Sun v. United States*, 371 U. S.

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produce the requested evidence and confer immunity as in this section provided. No order to answer or produce evidence with immunity shall be made except by resolution of a majority of all the members of the commission and after the attorney general and the appropriate county prosecutor shall have been given at least 24 hours written notice of the commission's intention to issue such order and afforded an opportunity to be heard in respect to any objections they or either of them may have to the granting of immunity.

b. If upon issuance of such an order, the person complies therewith, he shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate, except that such person may nevertheless be prosecuted for any perjury committed in such answer or in producing such evidence or for failure to give an answer or produce in accordance with the order of the commission; and any such answer given or evidence produced shall be admissible against him upon any criminal investigation, proceeding or trial against him for such perjury, or upon any investigation, proceeding or trial against him for such contempt."

471 (1963). These rules were adopted to avoid reducing, in the words of Mr. Justice Holmes, "... the Fourth Amendment to a form of words." *Silverthorne Lumber Co. v. United States*, *supra* at 392. And they have been found to be effective methods of implementing the dictates of the Fourth Amendment. They are directed not only to the deterrence of unlawful police activity, *Mapp v. Ohio*, 367 U. S. 643, 656 (1961), but also at maintaining the "imperative of judicial integrity" and respect for law, *Ibid.*, at 659. Further, in the Sixth Amendment area, the rule of exclusion has been applied to render inadmissible statements unlawfully obtained from a defendant, free on bail, in the absence of retained counsel. *Massiah v. United States*, 377 U. S. 201 (1964). This rule was subsequently applied against the states in *McLeod v. Ohio*, 381 U. S. 356 (1965). In cases involving violations of the Fourth and Sixth Amendments then, the remedy developed by this Court to redress the wrongs committed has not been to bar prosecution altogether, but rather to suppress the evidence and its fruits. Indeed, even in the area of possible Fifth Amendment violations, this Court has intimated that barring prosecution is too drastic a step to take. Thus, in *United States v. Blue*, 384 U. S. 251 (1966) the Court, per Mr. Justice Harlan, held that in a proceeding on deficiency assessments, even if the government acquired incriminating evidence in violation of the Fifth Amendment, the taxpayer was not thereby entitled to a bar of an income tax evasion prosecution, but would at most be entitled to suppress evidence and its fruits if they were sought to be used against him at a criminal trial. As the Court stated:

"Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the



prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book." *Ibid.* at 255.

Moreover, the "use plus fruits" immunity standard has strong support from the treatise writers. Dean Wigmore in his *Evidence Treatise* advocates that standard, and cites numerous pre-*Counselman* cases in support of it. 8 Wigmore, *Evidence* § 2283 (3rd Edition 1940):

"The constitutional efficacy of this type of statutes ("use plus fruits") for their purpose was well expounded by the following early opinions, written at a period nearer to the era of constitution-making, when the cobwebs of artificial fantasy had not begun to obscure its plain meanings: 1853, Scott, J., in *State v. Quarles*, 13 Ark. 307, 311: The privilege in question, in its greatest scope, as allowed by the common law—and no one, be he witness or accused, can pretend to claim it beyond its scope at the common law—never did contemplate that the witness might not be proved guilty of the very crime about which he may be called to testify; but only that the witness should not be compelled to produce the evidence to prove himself guilty of that crime. His privilege, therefore, was not an exemption from the consequences of a crime that he might have committed; but only an exemption from the necessity of himself producing the evidence to establish his own crime . . ." *Ibid.*, at 523-524.

And in discussing the so-called transactional immunity standard of the *Counselman* decision, Wigmore states:

"It is unfortunate that the Court in which the latter pronouncement was made [i.e. in *Counselman*] should have allied itself with such feeble forces." Ibid., at 528.

This same view is also taken by Professor McNaughton, 8 Wigmore, Evidence § 2283 (McNaughton rev. 1961); and Professor McCormick, McCormick Handbook on the Law of Evidence § 135 (1954).

Two years after *Blue*, the Court decided three cases involving various forms of registration or taxation which would have obligated persons so registering or so paying taxes to incriminate themselves. Thus, in *Marchetti v. United States*, 390 U. S. 39 (1968), defendant was indicted and convicted for failure to pay an occupational tax on wagering and for failure to register before engaging in the business of accepting wagers. The Court reversed, per Mr. Justice Harlan, holding that those who properly assert the constitutional privilege as to the provisions requiring payment of tax and registration, may not be criminally punished for failure to comply with their requirements. However, the Court was urged by the government to impose restrictions upon the use by federal and state authorities of information obtained as a consequence of compliance with these requirements. The Court said:

"The Government's suggestion is thus in principle an attractive and apparently practical resolution of the difficult problem before us." 390 U. S. at 58.

The Court declined to take such action because it felt that to do so would defeat the clear congressional purport to provide such information to interested prosecuting authorities, and as such would constitute judicial in-

interference with congressional prerogatives. In *Grosso v. United States*, 390 U. S. 62 (1968) a wagering tax system similar to the one noted in *Marchetti, supra*, was found to have placed an impermissible constitutional burden upon a person convicted of failure to pay the tax, and his conviction was accordingly reversed. The Court again declined to apply a use restriction upon the information thus obtained by the government "for reasons discussed in *Marchetti*." 390 U. S. at 69. Thus, once again, the Court found the principle of applying, in effect, a "use plus fruits" immunity, an attractive and practical resolution to the problem before it, but declined to do so for reasons unrelated to the efficacy of such a solvent. Finally, in *Haynes v. United States*, 390 U. S. 85 (1968), defendant's conviction for possession of a firearm which he failed to register under the National Firearms Act was held not constitutionally permissible, and that proper claim of the constitutional privilege against self-incrimination provided a full defense to prosecution either for failure to register or for possession of an unregistered firearm under the Act. And again the Court declined to impose a use restriction upon the information thus obtained "for reasons indicated in *Marchetti, supra*, and *Grosso, supra*." 390 U. S. at 100. Thus, in all three cases, the Court was willing, although unable to, in effect, grant a "use plus fruits" immunity with respect to either federal or state use of information to vindicate the rights afforded under the Fifth Amendment.

In another line of cases, dealing with the requirements of public officials or employees to give an accounting of their public duties, and applying the Fifth Amendment privilege to these situations, this Court has consistently held that imposing an immunity from use of compelled testimony and its fruits was sufficient to protect such em-

ployees' Fifth Amendment rights. Thus, in *Garrity v. New Jersey*, 385 U. S. 493 (1967), where there was no immunity statute to protect witnesses, it was held that statements made by police officers, who were questioned about their official duties and who were told that their reliance upon the Fifth Amendment privilege against self-incrimination would subject them to removal from office, could not be used in a subsequent criminal prosecution against them. The reason was that threat of removal constituted the kind of compulsion against which the constitutional privilege was directed and that statements made under such compulsion could not be used at a subsequent criminal trial. Once the compulsion was found therefore, the remedy was to bar use of compelled statements at a criminal trial, not to bar prosecution altogether. 8 Wigmore, Evidence § 2270 at 417-19 (McNaughton rev. 1961); citing *inter alia*, *Adams v. Maryland*, 347 U.S. 179, 181 (1954), wherein it was said, per Black, J.: "Indeed a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without statute." On the same day *Garrity*, *supra*, was decided, the Court also held, in *Spevack v. Klein*, 385 U.S. 511 (1967), that New York could not disbar a lawyer solely for refusing, on the basis of his Fifth Amendment privilege, to produce financial records and to testify at a judicial inquiry into "ambulance chasing". However, this did not absolutely preclude disbarment. The Court reserved the possibility of disbarment based upon material obtained independently of any compelled testimony. Then, in *Gardner v. Broderick*, 392 U.S. 273 (1968), and *Uniformed Sanitation Men Association v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968), the Court held, per Fortas,



J., that refusal of public employees to sign waivers of immunity, or their invocation of the privilege against self-incrimination before a grand jury investigating performance of their official duties, could not constitutionally result in their discharge from office. The Court reasoned that such action violated their constitutional privilege against self-incrimination. Speaking for the Court in *Gardner, supra*, Mr. Justice Fortas stated, 392 U.S. at 276:

"Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony of its fruits in connection with a criminal prosecution against the person testifying. *Counselman v. Hitchcock, supra*, 142 U.S. at 585-586, 12 S. Ct. at 206-207. *Murphy v. Waterfront Commission, supra*, 378 U.S. at 79, 84 S. Ct. at 1609". (Emphasis added.)

More recently, the Second Circuit held in *Uniform Sanitation Men Association v. Commissioner of Sanitation*, 426 F.2d 619 (2nd Cir. 1970), per Friendly, J., that where the city granted immunity to sanitation department employees from the use of answers to questions relating to performance of their official duties in subsequent criminal prosecutions and did not require any waiver of immunity, that the city was warranted in dismissing the employees upon their refusal to answer the questions. Judge Friendly noted in his opinion that "... 'use immunity' suffices for the discharge of public employees who 'refuse to account for their performance of their public trust', and that '(e)ven if use immunity should ultimately be held insufficient in the *Counselman* situation, which we in no way intimate, there would be sufficient reasons to support a less stringent requirement with respect to im-

munity where the issue is not whether a witness should be put in jail until he answers but whether a public employee should be dismissed for refusal to give an account of his official conduct." Ibid., at 626. It is the position of appellee that a "use plus fruits" immunity should be upheld as valid in both of the situations described above, and that accordingly cases such as *Garrity, supra, Spevack, supra, Gardner, supra*, and *Uniform Sanitation Men Association, supra*, support the view the Commission advances, i.e., that "use plus fruits" immunity is constitutionally sufficient to replace the Fifth Amendment privilege against self-incrimination. The Court in *Gardner, supra*, for example, did not qualify its view that "use plus fruits" immunity was a proper immunity configuration in the circumstances of that case by indicating that such an immunity would suffice only because the person involved was a public employee. Rather, the Court cited *Garrity* for the proposition that an employee's statements may not be used against him in a *criminal prosecution*, and concluded that there is no relinquishment of a constitutional privilege in his being forced to account for his official conduct. The central concept, then, is use restriction vis-a-vis possible prosecution. Thus, Mr. Justice Fortas stated in *Gardner*:

"If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a *criminal prosecution* of himself, *Garrity v. State of New Jersey, supra*, the privilege against self-incrimination would not have been a bar to his dismissal." 392 U.S. at 278 (Emphasis added.)

In fact, the Court, after noting the necessary parameters of a grant of immunity, cites *Counselman* and *Murphy*,

*supra*, as supporting the view it takes. 392 U.S. at 276. This would suggest that the Court viewed the constitutional question in *Gardner* in the same light and as controlled by the same considerations which it understood *Counselman* and *Murphy* as applying. Moreover, there are forceful reasons why this should be so. If a public employee were apprehensive only about the loss of his public position, perhaps a "less stringent requirement" under the Fifth Amendment could be justified. But this is not the case. For in these circumstances there is also a real fear of criminal prosecution based on the account given of public conduct under compulsion. Otherwise there would be no reason to compel an accounting of public service at first instance. This Court in *Uniform Sanitation Men, supra*, recognized this dilemma when it stated, 392 U.S. at 283:

"Petitioners were not discharged merely for their refusal to account for their conduct as employees of the city. . . . They were discharged for refusal to expose themselves to *criminal prosecution* based on testimony which they would give under compulsion, despite their constitutional privilege." (Emphasis added.)

Thus, while the "less stringent" standard might conceivably apply to a situation where the *sole* threat was dismissal, it clearly cannot apply where there is also a real fear of criminal prosecution. The Fifth Amendment can surely mean no less.

As earlier indicated, the Fifth Amendment rule of exclusion need not be identical with the Fourth<sup>11</sup> or Sixth Amendment rules. For one thing, a grant of Fifth

<sup>11</sup> Appellee's Brief, at 30 N. 1.

Amendment immunity is a substitute for the Fifth Amendment itself, and is intended to "prevent harm to the particular individual" receiving it.<sup>12</sup> However, the Fourth Amendment exclusionary rule is not the substance of the right itself, but the means by which the constitutional right is enforced. The exclusion of evidence seized in violation of the Fourth Amendment is derivative and remedial; it is a means to enforce the primary aspect of the right—that illegal searches and seizures should not take place.<sup>13</sup> The exclusionary rule is therefore designed "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."<sup>14</sup> Viewing the primary function of the Fourth Amendment exclusionary rule as one of deterrence, the right to privacy thereunder is, in terms of the rule, a right to be looked on as it relates to society as a whole and not to the particular defendant or witness in question. Exclusion is thus not intended to place the defendant in the position in which he would have been but for the illegal search and seizure, but is designed instead to curb police activity in general as it violates the Fourth Amendment.<sup>15</sup> By contrast, the ex-

<sup>12</sup> See Note: "Scope of Taint Under the Exclusionary Rule of the Fifth Amendment Privilege Against Self-Incrimination," 114 U. Pa. L. Rev. 570, 573 (1966).

<sup>13</sup> *Ibid.*, at 573-574.

<sup>14</sup> Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Cal. L. Rev. 579, 580 (1968), citing *Mapp v. Ohio*, *supra* at 656.

<sup>15</sup> 114 U. Pa. L. Rev. at 574, *Mapp v. Ohio*, *Ibid.*, at 656. It is worth reiterating at this juncture that the Fourth Amendment

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clusionary rule in the Fifth Amendment area does not implement the rule of silence but rather supplants it. As noted before, the right the immunity grant supplants is a right to absolute proscription of use of compelled testimony. As Mr. Justice Black said in his dissenting opinion in *Feldman v. United States*, 322 U.S. 487, 499-500:

"The real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminating testimony was that thought to inhere in using a man's ~~compelled testimony~~ to punish him." (Emphasis added)

Since this rule is more closely linked with the rights of the individual and is a more integral part of the privilege than the Fourth Amendment exclusionary rule, it may be necessary for courts to develop a different and perhaps less flexible manner of applying it. Thus, to meet the coextensiveness test of *Counselman, supra*, it might be necessary that the "independent source" test of *Murphy, supra* at 79, be construed as meaning that a sovereign

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exclusionary rule is intended primarily to deter unlawful police activity, and only incidentally to render inadmissible evidence seized in violation of the Fourth Amendment. *Mapp v. Ohio, supra*. But even if the primary target of the rule is taken to be the barring of use of illegally obtained evidence, the amendment does not preclude *all* use of illegally seized evidence. For it is possible, under existing case law, to use tainted evidence seized in violation of the Fourth Amendment as long as the "evidence to . . . which . . . objection is made has been come at by . . . means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U. S. 471, 488 (1963). Thus, the Fifth Amendment's *absolute* requirement against use of compelled testimony at trial may well demand a stricter rule of exclusion to support that requirement.

wishing to prosecute after a grant of immunity be required to use only that which is in no way causally related to the compelled testimony. The evidence used must have *an entirely independent origin*, not the mere possibility that it could have had such an origin or even that it would have had such an origin.

The development of the "fruit of the poisonous tree" doctrine<sup>16</sup> lends support to this analysis. The first case to recognize the doctrine was *Silverthorne Lumber Co. v. United States*.<sup>17</sup> In discussing the prohibition of the use of tainted evidence, the Court, per Holmes, J., said, 251 U. S. at 392:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

A broad reading of *Silverthorne* leads to the conclusion that illegally seized evidence may never be used by the government although facts revealed by that evidence may be obtained from an independent source. Some nineteen years later, the Court modified the *Silverthorne* doctrine in *Nardone v. United States*, 308 U.S. 338 (1939). After reiterating the "independent source" rule of *Silverthorne*, the Court went on to observe:

<sup>16</sup> See Appellee's Brief, at 36-37.

<sup>17</sup> 251 U. S. 385 (1920).

"In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. . . ." 308 U.S. at 341.

The additive of an attenuation limitation relaxes the original "independent source" test by conceding the possible existence of taint in admissible evidence but arguing that it has become dissipated. Most recently, a third variation on the taint theme was enunciated in *Wong Sun v. United States*, 371 U.S. 471 (1963). The Court stated:

"We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint'." Ibid., at 487-488.

This rule is still more relaxed than the *Nardone* test, for it holds that illegally obtained evidence is not sacred or inaccessible when the government learns of it from a source separate and distinct from its own illegal activity. Thus, evidence is not necessarily the "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police.<sup>18</sup> It is respectfully

<sup>18</sup> Pitler, *supra* at 593-594.

submitted that this Court's articulation of an unqualified "independent source" test in *Murphy*,<sup>19</sup> implicitly rejects the two most recent tests of *Nardone* and *Wong Sun* and reaffirms the original *Silverthorne* test. It is further submitted that this conforms to the analysis that the Fifth Amendment exclusionary rule may have to be stricter than the exclusionary rule which sprang from the Fourth Amendment in order to protect the different values and policies which the former embraces.

Appellant maintains that "adoption of a use-immunity standard would also add yet another type of pretrial motion to burden courts already beset by a mounting case-load." *Appellant's Brief*, at 28. Next, appellant quotes from Judge Motley's opinion in *In re Grand Jury Testimony of Joanne Kinoy*, — F. Supp. —, (D.C.S.D.N.Y. 1971) in support of the above point. *Ibid.*, at 28-29. Then appellant continues by maintaining, at page 29 of his brief:

"Transactional immunity raises none of these problems. It provides the individual with an assurance that he is not testifying about matters for which he may later be prosecuted. No question arises of tracing the use or non-use of information gleaned from the witness' compelled testimony. The sole question presented to the Court is whether the subsequent prosecution is related to the substance of the compelled testimony. . . . *Piccirillo v. New York*, 27 L. Ed. 2d at 609."

Initially, it might be said of this line of argument that if indeed docket congestion were a valid reason to avoid any additional burdens of litigation in our courts, then the ex-

<sup>19</sup> 378 U.S. at 79 n. 18. See also Mr. Justice White's concurring opinion in *Murphy*, *supra* at 102-107.



elusionary rule in the Fourth Amendment and Sixth Amendment areas should likewise be abolished and replaced with a rule barring prosecution with respect to any individual whose Fourth or Sixth Amendment rights were violated. This would, after all, relieve the courts, state and federal, of many of their pretrial burdens. But such a result, apart from being facially absurd, has no support whatever in the cases,<sup>20</sup> and neither appellant nor Judge Motley has cited any authority in support of this novel theory. In fact, there is nothing within our American framework of jurisprudence which excuses courts from the "burden" of hearing motions to suppress. Moreover, the assertion that "transactional immunity raises none of these problems" is simply not true. For example, in *Heike v. United States*, 227 U.S. 131 (1913), the Court, per Holmes, J., held that evidence given by a person before a federal grand jury investigating violations of the anti-trust laws, under a grant of transactional immunity, could not defeat a prosecution, in a subsequent proceeding, for a conspiracy to commit an offense against the United States, where the evidence given in the former proceeding did not concern the latter proceeding *in any substantial way*, and has no such tendency to incriminate him as to have afforded a ground for refusing to give it. As the Court said, *Ibid.*, at 144:

"When the (immunity) statute speaks of testimony concerning a matter it means concerning it in a substantial way, just as the constitutional protection is confined to real danger, and does not extend to re-

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<sup>20</sup> See *Weeks v. United States*, *supra*; *Mapp v. Ohio*, *supra*, for cases dealing with Fourth Amendment violations, and *Massiah v. United States*, *supra*, and *McLeod v. Ohio*, *supra*, dealing with the Sixth Amendment area.

note possibilities out of the ordinary course of law. *Brown v. Walker*, 161 U.S. 591, 599, 600; See 5 Wigmore, Ev. § 2281, p. 238."

It is respectfully submitted that the courts likewise have had to assume the additional onus, under the transactional immunity standard, of deciding before trial whether testimony given under such immunity concerns the subject matter of a subsequent prosecution "in a substantial way", as well as deciding generally whether the testimony given had a "tendency to incriminate", so as to have afforded the defendant a ground to refuse to answer in the first place. It is scarcely tenable to suggest these burdens would be any less onerous than pretrial motions to suppress would be under a "use plus fruits" immunity standard. Finally, as Mr. Justice White notes in his concurring opinion in *Murphy, supra*, at 104:

"... greater requirements or difficulties of proof by a defendant inhere in the rule of absolute immunity. When a witness testifies under the auspices of an immunity act, the immunity he gets does not secure him from indictment or conviction. *Heike v. United States*, 217 U.S. 423, 30 S. Ct. 539, 54 L. Ed. 821. The witness must plead and prove, as an affirmative defense, that he has received immunity and that the instant prosecution is on account of a matter testified to in exchange for immunity. *Heike v. United States*, 227 U.S. 131, 33 S. Ct. 226, which may pose considerable difficulties where the relationship between the testimony and the prosecution is not obvious or where the immunity is acquired as a result of testimony before a grand jury or in

an *in camera* administrative proceeding. (Citations omitted.)"

Appellant further contends that "despite the fact that under a use immunity statute the government would undoubtedly have the burden of establishing, in a subsequent prosecution, that its evidence was untainted, (citation omitted), enormous practical difficulties would still remain," in ascertaining whether a subsequent prosecution was derived from compelled testimony or from an "independent source". This can be no more than conjecture. By analogy, it may be said that the "fruit of the poisonous tree" doctrine in the Fourth Amendment areas of search and seizure and wire tapping leaves too much latitude and possibilities for abuse in the hands of the prosecutor. For here the police may unscrupulously fail to give full disclosure and do so with the probability that this secretive practice will never be discovered.<sup>21</sup> How-

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<sup>21</sup> It is noteworthy that where other constitutional violations have been committed by the acts of law enforcement officers in the gathering of evidence through unlawful searches and seizures, wiretaps or coerced confessions, the constitutional remedy applied is prohibition of the use of such evidence rather than prosecution itself. *Miranda v. Arizona*, 384 U. S. 436 (1966); *Mapp v. Ohio*, 367 U. S. 643 (1961); *Hoffa v. United States*, 387 U. S. 231 (1967); *United States v. Blue*, 384 U. S. 251 (1966). An illegal search, wiretap or coerced confession could be as revealing of investigatory leads as testimony given in exchange for immunity, yet prosecution is not barred in such cases.

Clearly the protection which the Constitution affords against injurious compulsion can be no less when the compulsion is exerted by law enforcement officers than when exerted by the instant statute. Since a bar on prosecution is not required to pro-

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ever, evidence compelled from a witness in an investigation conducted under a grant of immunity is a matter of record, and in an immunity hearing an individual would be painfully aware of the evidence he has given. The prosecutor who wishes to attempt to circumvent the "independent source" test will have to gamble that he can successfully commit the financial resources available for law enforcement to attempt to prosecute the defendant on tainted evidence and sufficiently disguise the basis of his prosecution to convince the court that it rests on legitimate, independently secured evidence. And he will have to do this while running the gauntlet of objections from a defendant who is armed, unlike the search and seizure defendant, with an exact and complete record of what forbidden evidence the government utilized in its original attempt to prosecute him.<sup>22</sup> Moreover, in developing a workable Fifth Amendment rule of exclusion, the courts may feel that a high burden of persuasion is necessary for the government to sustain in order to insure that the sources of its evidence are independent. Of course, the more difficult the burden of persuasion the government has to carry is, the greater the assurance that the evidence it uses

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test against compulsion by law enforcement, it is certainly not required when the State has compelled testimony and itself has prohibited use of any compelled testimony.

Thus, where as here, the immunity offered is "as broad as, but not wastefully broader than the privilege" the statute is valid. 8 *Wigmore*, §2283, Page 525; *Murphy v. Waterfront Commission*, 378 U. S. 52, 106-107 (1964) (White, J., concurring).

<sup>22</sup> See Comment, "*Federalism and the Fifth: Configurations of Grants of Immunity*", 12 U.C.L.A. L. Rev. 561, 583-584 (1965).



to prosecute an individual is "independent". For example, in *United States v. Pappadio*, 235 F. Supp. 887, 890 (1964), the court held that in a subsequent prosecution of a witness who had testified under immunity before a grand jury, "the burden would be on the Government to prove, *clearly and convincingly*, that all of its proof is derived from sources completely independent of the witness's grand jury testimony, and any clues or leads derived from such testimony." Appellee does not maintain that the burden set out in *Pappadio* is necessarily the best possible test to insure "independent sources"; there are, of course, two alternatives to the "clear and convincing" test, i.e., "preponderance of the evidence" and "beyond a reasonable doubt". The point is that there is a sliding scale of burden of persuasion—gradations, one of which may help to best insure the independence of government evidence in any case where that issue is in focus. Finally, it has been suggested<sup>23</sup> that in order to insure the independence of the government's evidence, the prosecutor should testify under oath (and thus under pain of perjury if he fabricates) to the independence of his evidence and, where possible, bring in support witnesses to corroborate his testimony. Again, appellee does not assert the necessity of such measures, but rather mentions them as possible judicial means to achieve the end sought, i.e., "independent evidence", in a manner which will both protect the individual's Fifth Amendment rights without unnecessarily thwarting the government's attempts to prosecute on the basis of sources independent of compelled testimony. The primary point to be made then is that, as in the area of Fourth and Sixth Amendment exclusion, workable guide-

<sup>23</sup> See *In re Koota: The Scope of Immunity Statutes*, 61 Nw. U. L. Rev. 654 (1966).

lines can be drawn by the courts themselves to insure compliance with the dictates of the Fifth Amendment under the "use plus fruits"—immunity standard. The Judiciary has developed such exclusionary rules in constitutional areas as sensitive and fundamental as the area presented in the instant case, i.e., the areas of the Fourth and Sixth Amendments, and there is good reason, both in logic and history to assume that the same type of rule could and should be developed in the Fifth Amendment area. Finally, and regardless of the incidence of convictions obtained based upon such prosecutions, "[i]t is precisely this *possibility* of prosecution based on untainted evidence that we must recognize". *Murphy v. Waterfront Commission*, 378 U.S. at 106, White, J., concurring.

The practical effect of the *Murphy* rule, then, will be what the *Counselman* rule attempted to realize—to assure that no man will be compelled to furnish evidence which can be used to convict him of a criminal offense. But unlike *Counselman*, it will not attempt to provide this assurance by requiring immunity "wastefully broader than the privilege" which denies the government the opportunity to prosecute law violators on the basis of evidence not secured by use of their compelled testimony.<sup>24</sup>

**C. The values and policies of the Fifth Amendment, as well as compelling practical considerations support the instant "use plus fruits" immunity standard.**

For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Harwicke) has the right to every man's evidence. When the various claims of ex-

<sup>24</sup> Comment, *supra* at 584.

emption are examined, the starting premiss is that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from the positive general rule.<sup>25</sup> This maxim is, of course, as true with respect to the Fifth Amendment exemption as it is about any other type of exception. As important an exception as the Fifth Amendment right that "no person shall be compelled in any criminal case to be a witness against himself" is, it should not be arrogated to a plane higher than the equally important general rule, stated above, to which it is an exception. Rather, a balance must be struck to best achieve the primary objectives of both rules, consistent with one another.

As this court stated as recently as *California v. Byers*, — U.S. —, 39 LW 4579, 4580 (May 8, 1971):

"Whenever the court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly."

Appellee contends and will show that when "the balance" between "public need" and "individual claim to constitu-

<sup>25</sup> 8 Wigmore, Evidence § 2192 (McNaughton rev. 1961), quoted with approval in *United States v. Bryan*, 339 U. S. 323, 331 (1950).

tional protection" is struck, its pendulum will rest on the "use plus fruits" immunity standard rather than on a wastefully broader transactional immunity. The preemptory right of the people to every man's evidence should not be derogated from any further, by its various exceptions, than is necessary to achieve the variegated ends justifying the exceptions. Thus, the rules defining the scope of the exceptions should be formed with a just deference to the vital need of society in general for relevant evidence. As Mr. Justice White stated in his concurring opinion in *Murphy v. Waterfront Commission, supra* at 93-94:

"Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies. See *Blair v. United States*, 250 U. S. 273, 39 S. Ct. 468, 63 L. Ed. 979. Such testimony constitutes one of the Government's primary sources of information. The privilege against self-incrimination, safeguarding a complex of significant values, represents a broad exception to governmental power to compel the testimony of the citizenry."

It follows that any rule enunciating the scope of the privilege against self-incrimination should allow for the garnering of a maximum amount of information consistent with the values and policies of the exception itself. It is respectfully submitted that the instant "use plus fruits" immunity statute will better achieve this end than the transactional immunity standard urged by appellant. Under the former standard a person is immunized with re-



spect to testimony he gives plus any evidence flowing directly or indirectly therefrom. Therefore, the more testimony a witness gives under this immunity, the greater will be his protection from possible future prosecution based upon the testimony and evidence he gives. Thus, the amount of protection a person can secure is directly proportional to the amount of testimony and accompanying details he gives under the grant of "use plus fruits" immunity. The incentive to give more information then results in greater protection for the individual and in greater amounts of useful information for the state. But, this result is not achieved under a grant of transactional immunity. Under the latter grant, a person need only adumbrate answers to the questions put to him and he still receives an absolute immunity "for or on account of any transaction matter or thing concerning which he may testify or produce evidence. . . ." Thus, the *incentive* to give complete and detailed responses to questions is stripped from a person testifying under such an immunity, because once having merely mentioned an area of possible criminal activity, he achieves all the protection he can possibly receive under the original immunity grant. Transactional immunity then, acts as an effective prophylactic to impede the governments efforts to secure the very information it so vitally needs to effectively operate. Nowhere is this need for access to information so acute as with commissions such as the State Commission of Investigation. The Commission is an essentially investigatory-legislative agency<sup>26</sup> with the duty to investigate over a broad area of public concern. The duties and powers of the Commission are expansively set forth in N.J.S.A. 52:9M-2:

<sup>26</sup> *In re Zicarelli*, 55 N. J. 249, 256-261 (1970).

The commission shall have the duty and power to conduct investigations in connection with:

- a. The faithful execution and effective enforcement of the laws of the state, with particular reference but not limited to organized crime and racketeering;
- b. The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;
- c. Any matter concerning the public peace, public safety and public justice.

After this broad mandate, the commission is given additional duties under N.J.S.A. 52:9M-3:

At the direction of the governor or by concurrent resolution of the legislature the commission shall conduct investigations and otherwise assist in connection with:

- a. The removal of public officers by the governor;
- b. The making of recommendations by the governor to any other person or body, with respect to the removal of public officers;
- c. The making of recommendations by the governor to the legislature with respect to changes in or additions to existing provisions of law required for the more effective enforcement of the law.

These duties make it as clear as anything can be that the Commission's efficacy in achieving its statutorily-prescribed goals is inextricably connected with its ability to secure a maximum amount of information during the course of its activities. Subsection (c) above mandates

the making of recommendations. "for the more effective enforcement of the law", an area of obviously paramount governmental interest. Yet it is difficult to conceive of a more Sisyphean task for the commission to undertake than for it to have to essay to make recommendations for possible future legislation based on incomplete or insufficient information. This unacceptable situation is precisely what a transactional immunity standards tends to generate, at least in so far as it tends to truncate the amount of relevant information a person will give by undermining the incentive to give it. Moreover, the probability of the information given will be greater under the instant "use plus fruits" immunity standard than under transactional immunity. This is so because the risk of prosecution for perjury, a risk a witness runs under either immunity configuration, is increased when a greater amount of information is given, because the state then has more possible avenues of exploration to ferret out perjured testimony. And since, for reasons previously mentioned, a person testifying under a "use plus fruits" immunity has a greater incentive to give more information than one testifying under transactional immunity, it follows that the former will have to be more solicitous in protecting himself against prosecution for perjury, by giving trustworthy information so as to avoid a greater hazard of such prosecution. The converse of this analysis, of course, is that the less information a person must give, the less chance he has of being prosecuted for perjury. This is because the state does not have as much information to parse to determine whether perjury has been committed. And, as it has already been demonstrated that the incentive to give testimony is not as great under transactional immunity as it is under "use plus fruits" immunity, information secured under the broader immunity grant will tend to be less trustworthy and thus less probative

than similar information given under the instant "use plus fruits" immunity statute.

Further, the State Commission of Investigation will not be able as well to fulfill the important role it serves in the State of New Jersey<sup>27</sup> under the broader grant of immunity. Since the commission is investigatory, it is absolutely necessary that it receive the utmost cooperation and assistance from local and state agencies. Recognizing this need, the New Jersey Legislature wisely passed N.J.S.A. 52:9M-14 which provides:

The commission may request and shall receive from every department, division, board, bureau, commission, authority or other agency created by the state, or to which the state is a party, or of any political subdivision, thereof, cooperation and assistance in the performance of its duties.

To date, the Commission has received the enthusiastic support of the divers agencies across the state of New Jersey and has in its turn cooperated to the fullest with the latter. Such agencies have been able in large measure, to cooperate with the assurance that their own ongoing investigations and possible prosecutions based thereon would not be jeopardized by immunity grants given by

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<sup>27</sup> The concept of statewide organized crime investigating and prosecuting units has been unstintingly endorsed by the President of the United States, who realizes the efficacy of such units in combating organized crime throughout the nation. In his message on "Organized Crime", Doc. No. 91-105, House of Representatives, 91st Cong., 1st sess. (1969), The President spoke of the concerted Federal, State and Local efforts needed to combat this menace and pledged \$300,000,000.00 in federal funds, most of which was to go to the states, in block grants to deal with problems of law enforcement. *Ibid.*, at 2-3.



the Commission. They were secure in the knowledge that if their own efforts were untainted, and their cases or proceedings built on "independent evidence", they could cooperate without fear of endangering said proceedings. This cooperative interchange of information and relative security vis a vis pending proceedings, has helped to bring about a climate wherein major legislative and executive break-throughs in the sensitive but frustrating area of dealing effectively with organized crime and racketeering<sup>28</sup> have been attained. But this climate of cooperation threatens to be severely undetermined, if not totally destroyed by the imposition of a transactional immunity standard. The alacrity with which cooperation and assistance is given to and by the Commission surely must ebb if heretofore cooperating agencies know that any such exchanges with the commission may one day, and unforeseeably, culminate in the loss of otherwise proper prosecutions because information given to them was given under a grant of transactional immunity. The tocsin would assuredly be sounded for an abrupt halt to any such future, and formerly salutary, exchanges by the agencies that feared the merciless lash of transactional immunity. The consequences of this development might not unreasonably be expected to be a severe incursion into the effectiveness of state law enforcement in general, not only with respect to New Jersey or to appellee Commission. "After all . . ." as Mr. Justice White said in his concurring opinion in *Murphy, supra* at 96, ". . . the States still bear primary responsibility in the country for the administration of the criminal law." The portentous cloud of transactional immunity in this situation thus threatens to engulf with-

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<sup>28</sup> See generally, *New Jersey State Commission of Investigation First Annual Report* (1970) and *New Jersey State Commission of Investigation 1970 Annual Report* (1971).

in its penumbra, the efficiency of legitimate state and local law enforcement activities throughout the states by cutting off important and heretofore accessible sources of information at a time when more effective tools are needed by the States to carry their heavy onus of responsibility in the law enforcement area. By contrast, the instant "use plus fruits" immunity statute undertakes to adopt what Mr. Justice Holmes defined as the "exchange theory" in *Heike v. United States*, 227 U. S. 131 (1914). This theory holds that, in as much as immunity statutes are enacted in reaction to the Fifth Amendment, it is necessary only that the immunity granted be co-extensive with the quid pro quo for which it was granted. They need not go further. And to the extent that a transactional immunity standard goes beyond this and offers an absolute defense to prosecution, it is not an "exchange" but rather a "gratuity to crime". 227 U. S. at 142. The exchange theory embodied in the instant statute strikes a more reasonable balance between the individual rights and the interests of the government by avoiding the "gratuity" trappings of transactional immunity and thus encouraging cooperation among state and local agencies in the area of law enforcement.

There are other compelling reasons why the "use plus fruits" immunity standard should be upheld. For example, the Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."<sup>29</sup> A possible conflict arises between the Fifth and Sixth Amendments when an accused standing trial calls a witness in his favor who refuses to testify on his behalf on the basis of the Fifth Amendment privilege against self-

<sup>29</sup>U. S. Const. Amendment VI.

incrimination. This conflict was recognized in terms of powers and duties of the government by Mr. Justice White, concurring in *Murphy v. Waterfront Commission*, 378 U.S. at 94 n. 1:

The power and corresponding duty are recognized in the Sixth Amendment's commands that defendants be confronted with witnesses and that they have the right to subpoena witnesses on their own behalf. The duty was recognized by the first Congress in the Judiciary Act of 1789, which made provision for the compulsion of attendance of witnesses in the federal courts. 1 Stat. 73, 88 (1789). See also Lilienthal, *The Power of Governmental Agencies to Compel Testimony*, 39 Harv. L. Rev. 694-695 (1926); 8 Wigmore, *Evidence*, §§ 2190-2193 (McNaughton rev., 1961).

Since the Sixth Amendment right to compulsory process in its sphere of operation is as important a safeguard to the accused as the Fifth Amendment privilege against self-incrimination is in its own bailiwick, one right should not be given precedence over the other. One way of alleviating the friction generated in the above situation would be to grant a subpoenaed witness an immunity in exchange for his testimony. Although this solution to the problem seems to resolve the tension between the two constitutional rights, it has been rejected in several cases. In *Earl v. United States*, 361 F. 2d 531 (C.A.D.C. 1966), the court held *inter alia*, per Burger Circuit Judge, that although the government might have granted a discharged codefendant immunity and required him to testify, the government's refusal to do so did not deny defendant a fair trial. But the court noted at 361 F. 2d at 534 n. 1:

We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process. Arguments could be advanced that in the particular case the Government could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused.

Thus, the court at least tacitly acknowledged a situation where a defendant may very well be entitled to the immunized testimony of a witness on his favor. The same court declined to disturb this holding in *Morrison v. United States*, 365 F. 2d 521 (C.A.D.C., 1966) where again defendant tried, but failed to get an immunity order for his witness. But the *Earl* court conceded that the Congress could provide for such a procedure i.e. giving a defendant a right comparable to the government to compel testimony, and obliquely suggested that the argument had some merit 365 F. 2d at 534, 535. To the extent that the suggestion does have merit, the question then becomes what type of immunity would the Congress be amenable to passing to afford a defendant this additional protection. It is respectfully submitted that a "use plus fruits" immunity would best achieve this end because the government would not run the risk of jeopardizing future prosecutions which they had already developed. This hazard of losing possible cases against witnesses compelled to testify under a grant of transactional immunity on behalf of a defendant is more than obvious. It is an ineluctable conclusion. Thus, while the Government would



stand to lose too much if it had to grant transactional immunity in exchange for testimony on behalf of a defendant, without this protection, innocent persons might lose valuable testimony on their behalf from third persons who would not testify without being given immunity. Congress would certainly be reluctant to provide this succor if transactional immunity were necessary on the same theory, i.e. that the cost to the government in terms of losing possible prosecutions would be too high a price to pay for the extra protection it gave defendants. However, the instant "use plus fruits" immunity standard relieves a major portion of these objections. By providing such a statute, the government need not give up prosecutions, based on independently secured evidence, against witnesses testifying on behalf of defendants. And the amount of testimony obtainable and the probity of that testimony would both be greater under the "use plus fruits" standard than under the transactional standard.<sup>30</sup> Indeed, in a recent incident, the son of a well known judge was arrested in a trailer home, along with other youths for possession of marijuana. In fact, the judge's son had arrived at the trailer just minutes before the police entered the premises, seized the drugs and arrested the occupants. Although the case against the judge's son was subsequently dismissed, if he had gone to trial and had wanted to secure the testimony of the owner of the trailer (who knew the judge's son had no knowledge of the drugs found by the police and who was himself prosecuted and convicted of the offense charged) to corroborate his assertion that he had no knowledge of the existence of the marijuana and that he had arrived only moments before

<sup>30</sup> See Appellee's Brief, *supra* at 57-58; 60-61 where these points are discussed at some length.

the police, the government's decision to grant a prospective defendant immunity or not would be greatly influenced by the scope of the immunity necessary. It seems clear that the government, in these circumstances, could not afford to grant transactional immunity. For by doing so, it would have to pardon a possible culpable party against whom it had a strong case, to allow the judge's son to secure testimony which he claimed would exonerate him. Under the circumstances, the government would have proper justification in denying the judge's son the best evidence available to exculpate him i.e. the testimony of a defendant. This Hobson's choice is avoided entirely if the government can grant the defendant a "use plus fruits" immunity similar to the instant statute. Under such a grant, the defendant-witness could relieve the judge's son of involvement by answering responsively that the latter arrived shortly before police and was not involved in the incident. This testimony would not have been a total bar from prosecution; defendant might have been prosecuted for the same offense on the basis of evidence independent of his testimony. Thus, it is patent that "use plus fruits" immunity is the more practical configuration to solve this otherwise difficult dilemma and best achieves the individual-state balance necessary to adjust the demands of society and the constitutional rights afforded its citizens.

Like considerations apply in the area of the Sixth Amendment "Confrontation" clause, which states that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>31</sup> Thus, in *State v. Nelson*, 72 Wash. Dec. 2d 269, 432 P. 2d

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<sup>31</sup> U. S. Const. Amendment VI.

857 (1967), defendant was charged with murder in the first degree. At his trial, the state called John Thomas Patrick Jr., an alleged accomplice, to testify. In response to 28 questions asked by the prosecutor regarding the night of the homicide, Patrick asserted the privilege against self-incrimination. Defendant appealed his subsequent conviction, contending that the prosecution denied him his Sixth Amendment right to confrontation when it repeatedly forced the witness to claim the privilege against self-incrimination in the presence of the jury. A divided Washington Supreme Court reversed and remanded. *Held*: The witness' refusal to answer gave rise to incriminating inferences not subject to cross-examination, thus abridging defendant's right to confrontation under the Sixth Amendment. The government, in the *Nelson* case, could easily have avoided the issue in that case if it had granted the witness immunity from use of his testimony, or its fruits. By doing so, the defendant would have had the opportunity to cross-examine the immunized witness, and the entire issue of "confrontation" would never have arisen. Similar considerations control the analysis of the scope of immunity necessary to best serve the interests of the parties in the "confrontation" area of the Sixth Amendment as in the "compulsory process" area of that same amendment. Under a "use plus fruits" immunity the government would not have to give up prosecution entirely in order to compel the witness' testimony; it could still have prosecuted him on evidence secured independently of his testimony. This of course would mean that the government itself would be a good deal less reluctant to grant such immunity to witnesses in its favor than it would if it had to relinquish any possibility of prosecution whatsoever, as it would be forced to do under a grant of transactional immunity. This in turn means more efficient and effective

law enforcement. Further, the amount of testimony the government would receive from such a witness as well as the trustworthiness of that testimony would, as shown in earlier parts of this brief,<sup>32</sup> be greater. Finally, the defendant would not have been deprived of the cherished constitutional right to confrontation, and so much of the appeal based upon the violation of that right would never have been before the court.

Additional practical arguments in favor of "use plus fruits" immunity can be marshalled in the area of regulation and taxation of illicit or highly suspect activities by federal and state government. As has previously been seen,<sup>33</sup> in proceedings involving deficiency assessments<sup>34</sup> taxes on wagering,<sup>35</sup> and failure to register or possession of unregistered firearms,<sup>36</sup> all areas brought with potential hazards of self-incrimination for those who fall within the class of persons required to register or pay taxes, this court has been urged to place restrictions on the use of the information thus obtained by Federal and State authorities. And this court has consistently asserted that "the suggestion is . . . in principle an attractive and apparently practical resolution of the difficult problems before us." *Marchetti v. United States*, 390 U. S. at 58. When confronted with the alternate suggestion that prose-

<sup>32</sup> See N. 30, *supra*.

<sup>33</sup> Appellee's Brief, at 39-40.

<sup>34</sup> *United States v. Blue*, 384 U. S. 251 (1966).

<sup>35</sup> *Marchetti v. United States*, 390 U. S. 39 (1968); *Grosso v. United States*, 390 U. S. 62 (1968).

<sup>36</sup> *Haynes v. United States*, 390 U. S. 85 (1968).



cution be barred absolutely in regard to criminal matters touching such information gathered, the court maintained in *United States v. Blue*, 384 U. S. at 255:

"Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book."

Implicit within the courts statement is the fact that while a coterminous exchange of immunity is practically, socially and constitutionally necessary to protect the Fifth Amendment right of the individual, *Counselman v. Hitchcock*, *supra*, *Murphy v. Waterfront Commission*, *supra*, the immunity proffered should not offer "a gratuity to crime." Holmes, J., *Heike v. United States*, *supra*, at 142, by granting a protection, "... wastefully broader than the privilege." 8 Wigmore, Evidence 8, 2283 at 525, (McNaughton rev. 1961), quoted with approval by White, J., *Murphy*; *supra* at 107 (concurring opinion). This "intolerable degree of interference with the public interest" is precisely what the "use plus fruits" theory avoids by creating a milieu in which abundant and probative information may be gleaned from persons granted immunity, who in turn receive protection fully commensurate with the right taken from them, and with a minimum interference with law enforcement prerogatives. This type of knowledge is especially critical in the area of national regulatory schemes, those which, as in the examples adduced above, involve a substantial hazard of self-incrimination to the persons affected. A broad transactional standard would at once

deter rather than encourage the federal government from entering these important areas, and at the same time discourage cooperation between federal agencies and between federal and state agencies. First, because of the possibly competing rationales precipitating enactment of regulatory schemes such as are seen in *Marchetti, supra*, *Grasso, supra*, and *Haynes, supra*, to wit, on the one hand, the need for revenue and/or pertinent information and, on the other hand, a combined desire to keep tabs on criminals, limit their illegal activities and especially help bring them to book, the government is put to a choice under the broader grant, as to which set of competing values it wishes to give priority. If the answer is revenue or information, then if forced to grant transactional immunity in their regulatory plans, the federal or state government must relinquish to some extent, the competing value of bringing criminals to justice. If they consider relinquishment of the latter too high a price to pay for information and/or revenue, then they are forced to pay that price at the inevitable expense of the people. It is respectfully submitted that one area should not have to prosper at the sufferance of the other; both are vitally important to the government and thus to the people. And both ends can be achieved by the imposition of use restrictions on information obtained under these regulatory plans. Next, the transactional standard will have the same inhibiting effect on cooperation among federal agencies as it was shown to have on various state agencies.<sup>37</sup> And as shown before,<sup>38</sup> the "use plus fruits" immunity standard will substantially arrest these inhibitions and provide the atmosphere whereby cooperation and assistance among federal and state agen-

<sup>37</sup> Appellee's Brief, *supra* at 61 thru 63.

<sup>38</sup> *Ibid.*

cies is encouraged rather than impeded. It is thus apparent that the only a "use plus fruit" immunity can achieve all these beneficial ends while at the same time affording as complete protection as is necessary and desirable under the Fifth Amendment. And it is equally manifest that transactional immunity fails to achieve them.

Apart from the above considerations, there are many preeminent and thoughtful persons, often of high station within federal and state government as well as many eminent law professors, attorneys, and others who have carefully weighed and analyzed the practical, social and constitutional ramifications of the Fifth Amendment and who have strongly endorsed "use plus fruits" immunity. For example, the National Committee on Reform of Federal Criminal Laws<sup>39</sup> was established in November of 1966 by the Congress to undertake a study of the Federal Criminal laws and to recommend improvements.<sup>40</sup> Among the im-

<sup>39</sup> 18 U.S.C. prec. § 1 note, Pub. L. 89-801, Nov. 8, 1966, 80 Stat. 1516.

<sup>40</sup> Section 2 of the National Commission provides for the membership of the Commission:

"The Commission shall be composed of—

'(1) three Members of the Senate appointed by the President of the Senate,

'(2) three Members of the House of Representatives appointed by the Speaker of the House of Representatives,

'(3) three members appointed by the President of the United States, one of whom he shall designate as Chairman,

*(Footnote continued on following page)*

portant topics the National Commission considered for revision were the Federal witness immunity laws. In a statement made before the Senate Subcommittee on Criminal Laws and Procedures<sup>41</sup> Congressman Poff, Vice Chairman of the National Commission stated:

*(Footnote continued from preceding page)*

'(4) one United States circuit judge and two United States district judges appointed by the Chief Justice of the United States.'"

The actual members appointed are as follows:

"HON. EDMUND G. BROWN of California, *Chairman*

Congressman RICHARD H. POFF of Virginia, *Vice Chairman*

U. S. Circuit Judge George C. Edwards, Jr. of Michigan

Senator Sam J. Ervin, Jr. of North Carolina

U. S. District Judge A. Leon Higginbotham, Jr. of Penna.,

Senator Roman L. Hruska of Nebraska

Congressman Robert W. Kastenmeier of Wisconsin

U. S. District Judge Thomas J. MacBride of California

Senator John L. McClellan of Arkansas

Congressman Abner J. Mikva of Illinois

Donald Scott Thomas, Esq. of Texas

Theodore Voorhees, Esq. of Dist. Col.

U. S. Circuit Judge James M. Carter of California and Congressman Don Edwards of California served as members of the Commission from its inception until December 1967 and October 1969, respectively."

<sup>41</sup> *Hearings on Measures Related to Organized Crime*, 91st Cong., 1st Sess. at 280-287 (1969).



"... we the Commission came to the conclusion that the grant of immunity to be exchanged for the privilege against self-incrimination—as is also recognized in title II of S.30, now pending before the committee—need not and should not be a defense as such but only a ground for suppressing the use that is the key word 'use'—of evidence, similar to the exclusionary rule which is now applied to evidence assembled in violation of various constitutional rights."<sup>42</sup>

The basic conclusion was subsequently endorsed by both the Senate and House Judiciary Committees, the President of the United States in a special message to Congress,<sup>43</sup> and ultimately by the Congress itself.<sup>44</sup> Moreover, the

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<sup>42</sup> *Ibid.*, at 281. For a thorough and most excellent elaboration on the scope of immunity question, see Professor Robert G. Dixon, Jr.'s prepared statement in the instant *Hearings*, *ibid.*, at 290-327. Professor Dixon, a Professor of Law at George Washington University Law Center strongly favors the "use plus fruits" immunity standard.

<sup>43</sup> *Message from The President of the United States to the Congress of the United States, Relevant to the Fight Against Organized Crime*, April 23, 1969; *Hearings on Measures Related to Organized Crime*, *supra* at 444, 448.

<sup>44</sup> The Organized Crime Control Act of 1970, Pub. L. 91-452, Title II, § 201 (a), Oct. 15, 1970, 84 Stat. 926, 18 U.S.C. §6001 *et seq.*

18 U.S.C. § 6002 provides, in pertinent part:

"... the witness may not refuse to comply . . . on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, . . ."

The similarity between this provision and the instant immunity statute of N.J.S.A. 52:9M-17 is readily apparent.

House of Representatives reported out an immunity bill<sup>45</sup> substantially similar to immunity proposed by the National Commission and the Senate Judiciary Committee prior to the passage of the Organized Crime Control Act of 1970. This support for "use plus fruits" immunity, comes from men cloaked in the greatest public trust in our country, i.e. elected officials and judges, as well as persons of eminence from the private sector of our country such as law professors, lawyers, and other concerned individuals,<sup>46</sup>

<sup>45</sup> H. R. Rep. No. 91-1188, 91st Cong., 2d Sess. (1970).

<sup>46</sup> Others actively involved in the National Commission on Reform of Federal Criminal Laws are,

#### "ADVISORY COMMITTEE

HON. TOM C. CLARK, *Chairman*  
 Maj. Gen. Charles L. Decker  
 Hon. Brian P. Gettings, (from Oct. 1969)  
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(Footnote continued on following page)

whose opinions and points of view should merit the closest scrutiny and be accorded great respect because of their

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sincere interest in the welfare of the country and its citizens. The study, scholarship and careful thought that went into the conclusions reached by this ensemble of highly respected individuals indicates the thoroughness and diligence with which they pursued their task. It can only be said that their opinions must lend great weight in support of the constitutional sufficiency and practical efficacy of "use plus fruits" immunity.

Finally, the instant statute enhances respectability for law while the broader transactional standard derogates from that respectability. Under the transactional immunity standard, the government is forced into the inconsistent posture of declaring certain activities unlawful i.e. subject to condemnation, on the one hand, and then inconsistently granting a perpetrator of that activity a full pardon with respect to the commission of the offense once he testifies under the immunity. This places the offender in the same position after the commission of the offense that he would be in had he never committed the offense at all. But this is trading with the devil, because if an act is condemnable *before* immunity is granted, then it must be condemnable *after* the grant of immunity. Thus, the government is forced, in effect, to fabricate vis à vis the relationship that an individual bears to the committed offense before and after a grant of immunity. Once the Rubicon is crossed, and certain actions are condemned, there should be no retreat by later removing the condemnatory nature of the deed. However, the "use plus fruits" immunity standard is not subject to this criticism. What the government labels unlawful, i.e. condemnable remains so both before and after a grant of "use of fruits" immunity. The only trade the government makes is an even exchange—a person's testimony for the government's assurance that it will not be used directly or indirectly



against him in any subsequent prosecution. Thus, the effect of the trade is not a complete pardon, because the witness can still be prosecuted on the basis of independent evidence. Rather it is a fundamentally fair barter, which enhances respect for law precisely because the law is being fair. And the average juror is bound to find testimony given under "use plus fruits" immunity more credible than that given under a transactional standard, because of the greater measure of trust he can repose in the basically fairer rule which extracted the testimony.

For all the above reasons, it is respectfully submitted that the instant "use plus fruits" immunity concept best reflects the values and policies the Fifth Amendment and supplies the best practical reason for adoption of this standard.

## POINT II

**The requirement of "responsive" answers to questions put under a grant of immunity does not violate Fourteenth Amendment due process.**

N.J.S.A. 52:9M-17 requires that any grant of immunity conferred by the commission be "responsive". Our research reveals that New York has a like provision in a new Grand Jury immunity statute, Proposed New York Criminal Procedure Law §190.40 (effective Sept. 1, 1971). The New York statute reads in pertinent part:

2. A witness who gives evidence in a grand jury proceeding receives immunity unless:

(b) Such evidence is not *responsive* to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive.

Appellant contends that this "condition" either on its face or as interpreted by the court below violates the "void-for-vagueness" doctrine of the Fourteenth Amendment Due Process Clause, and that therefore the ruling on this point by the Court below was in error. *In re Zicarelli*, 55 N.J. 249, 270 (1970).

It is respectfully submitted that due process is not violated by the requirement for responsive answers, that appellant misapprehends the nature of the "condition" imposed by the term responsive, that the lower court ruling was not in error, and that the decisions of this Court and other authorities so clearly uphold the constitutionality of this very language, as to negative appellant's contrary contention.

First, the "condition" which the term responsive imposes upon the answering requirement is not, as appellant would suggest, a method of government chicanery or subterfuge. The term does not blandish or lull a witness into giving answers which are not demanded by the questions. As the court said in *In re Zicarelli*, *ibid.*, at 270:

"The limitation is intended to prevent a witness from seeking undue protection by volunteering what the state already knows or will likely come upon without the witness's aid. The purpose is not to trap. Fairly construed, the statute protects the witness against answers and evidence *he in good faith believed were demanded*. (Emphasis added)

A fair reading of this language indicates appellant's confusion with respect to its intended purport. The emphasized language is read by appellant as meaning that the witness is protected from "use against him of answers

and evidence given in 'good faith.' *Appellant's Brief*, at 31, and that accordingly "the Court subsequently called upon to determine whether an answer was responsive would have to judge the "good faith" of the witness at the time the answer was provided" *Appellant's Brief*, at 34. But this is not the thrust of the language. Under the lower court test, the Court is not called upon to determine the "good faith" of the *witness* at the time the answer was given, but rather the sufficiency of the *answer* given in response to the question put. The proper emphasis is, therefore, on the answer given vis à vis the answer demanded, an objective test, and not on the witness's personal "good faith" in giving the answer, a clearly more subjective test. Put another way, the State is interested not in character analysis or considerations of moral turpitude, but rather in pertinent information. This confusion has lead appellant astray in his reliance on *Sinclair v. United States*, 279 U.S. 263 (1929). For in that case appellant was held in contempt for failure to answer questions put to him by a Senate committee. The Court rejected his contention that his conviction should be reversed because he acted in good faith on the advice of competent counsel, and went on to say at 299:

"The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt."

Here, as in *Sinclair*, *supra*, appellant confuses the notion of moral turpitude which is not in issue, with refusal to answer pertinent questions, which is the issue. Sufficiency of disclosure is discussed by Professor McNaughton, Wigmore, Evidence § 2282, p. 512 (McNaughton Rev. 1961). He states:

"The question will also arise whether the witness has in his testimony made a disclosure such as entitles him to the immunity. This may depend somewhat upon the phrasing of the particular statute. But, so far as the general principle is not affected by particular statutory wordings, it should be necessary and sufficient (a) that the witness states something, not merely denies knowledge of any facts, (b) *that his statement is of facts asked for by the opponent, not of facts volunteered or irrelevantly interjected* and (c) that the disclosure tend to incriminate the witness as to the crime prosecution which ultimately puts the immunity in issue." (Emphasis added.)

The emphasized language is in accord with the discussion of this point by the Supreme Court of New Jersey. It is obvious that an answer which is either not called for at all, i.e. volunteered, or one which bears no relevance to or is not appropriate to the question put cannot be "responsive" as that term is plainly intended to mean within the instant immunity statute, and as interpreted by the lower court. Moreover, appellant's suggestion that the Court subsequently called upon to determine the sufficiency of the answer would have to judge the "good faith" of the witness at the time the answer was given, reflects an illusory apprehension, i.e. the fear that an appellate court will be called upon to determine, on the basis of a sterile record, the "good faith" of the *witness* in answering and, if finding none, to hold him in contempt. As has been shown however, the court does not parse the witness's motive in answering the questions, but rather it examines the sufficiency of the answers themselves in relation to the questions put. If the objection is to the relevancy of the questions put, which appellant



does not suggest, then he would be entitled to a prior ruling by the lower court on the relevancy questions put to him. As Judge Motley said in *In re the Grand Jury Testimony of Joanne Kinoy*, — F. Supp. — (D.S. S.D.N.Y. 1971): "If a witness is not sure whether or not a question is related to the subject matter of the order, he is entitled to a prior ruling from the court. Only after such a ruling and the witness' continued refusal to answer would the witness be subject to a citation for contempt." This is in full accord with the commission's customary procedure.

Perhaps the most obvious oversight appellant commits is failure to recognize the discussion of this problem in the leading case of *Hoffman v. United States*, 341 U.S. 470 (1951). In that case, the petitioner refused to answer questions which he felt might tend to incriminate him of a federal offense. The trial judge found no real and substantial danger of incrimination to petitioner and ordered him to answer. Petitioner refused to answer and was held in criminal contempt. In reversing the conviction, the court laid down the test for proper invocation of the privilege, and at 486 said:

"To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a *responsive* answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Subsequently, this test of what is self-incriminatory was applied against the states thru the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 12 (1964). Thus it is clear that the above test applies with as equal vigor against New Jersey and the Appellee as it does against

the Federal Government. It is respectfully submitted therefore, that this honorable Court has already answered the instant objection before it by defining "self-incriminating" in terms of injurious disclosures based upon *responsive* answers to questions put. It is difficult to imagine any clearer or more definitive support for the constitutionality of the term responsive included in the instant statute than the rule formulated by your Honors using that very term. Moreover, "answer" itself is defined in *Webster's International Dictionary* (2d Ed. unabridged 1951), as "something done or given in *response* to an appeal, request, or the like, in return for something else; the act of making *response* or of giving something in return for something else." In this sense, "responsive" does not condition or qualify "answer" as appellant intimates. Rather, the two concepts are compliments of one another. Responsive thus helps to define what a true "answer" is at first instance. Yet appellant does not, nor could he object to the use of the term "answer" in the instant statute. "Answer" is a term so commonly and universally understood that it must surely be cavil to charge it with being "so vague that men of common intelligence must necessarily guess as to its application . . ." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Like considerations must therefore obtain when analyzing the word "responsive". Ultimately, of course, the determination as to whether a word or phrase is or is not so vague as to violate "due process" is a matter of fact for this Court to decide on the basis of how the particular word or phrase is understood by men of common intelligence. The many cases cited by appellant in support of his fanciful contention that the term responsive is overly vague are all wide of the mark in this case, because neither facially, nor as interpreted by the lower court or by this honorable Court in *Hoffman v.*

*United States, supra*, or as applied against the states in *Malloy, supra*, does the term responsive violate Fourteenth Amendment due process. It is therefore respectfully submitted that this contention is without merit.

### POINT III

Fear of foreign prosecution is not relevant in determining the validity of a Fifth Amendment claim of self-incrimination. Further, even if fear of foreign prosecution is now relevant, appellant has demonstrated no real and substantial fear of foreign prosecution.

- (1) Fear of foreign prosecution is not relevant in determining the validity of a Fifth Amendment claim of self-incrimination.

Appellant contends that fear of foreign prosecution is relevant in determining the validity of a Fifth Amendment claim of self-incrimination, and cites in support of that proposition, *Murphy v. Waterfront Commission of New York*, 378 U.S. 52 (1964), a case in which he recognizes "no such question was before the Court . . ." Appellant's Brief at 35-36. Appellant then contends that "... the Court could not have arrived at its specific holding otherwise." While there is language in the *Murphy* decision to support such analysis, there is also language and better reason to support the contrary position i.e. that foreign prosecution or prosecution outside the United States is not relevant in determining Fifth Amendment claims.

In the *Murphy* Court's analysis of the English cases dealing with this subject, much was made of the two par-

ticular reasons, which the Court understood as the basis for older rule, that fear of foreign prosecution was not relevant. These reasons were stated in *The King of Two Sicilies v. Willcox*, 1 Sim. (N.S.) 301, 61 Eng. Rep. 116 (1851):

(1) "The impossibility of knowing, as a matter of law, to what cases the objection, when resting on the danger of incurring penal consequences in a foreign country, may extend . . . , *id.*, at 331, 61 Eng. Rep., at 128; and (2) the fact that 'in such a case, in order to make the disclosure dangerous to the party who objects, it is essential that he should first quit the protection of our laws, and willfully go within the jurisdiction of the laws he has violated, *ibid.*, 61 Eng. Rep., at 128.'" 378 U.S. at 60-61.

This rule was subsequently modified in *United States v. McRae*, L.R., 3 Ch. App. 79 (1867), a case involving suit by the United States in an English Court for an accounting and payment of moneys allegedly received by the defendant as agent for the Confederate States during the Civil War. Defendant refused to answer questions on the ground that to do so would subject him to penalties under the laws of the United States. The Lord Chancellor said in *McRae*, *supra*, that *King of Two Sicilies* (holding that "the rule of protection [against self-incrimination] is confined to what may tend to subject a party to penalties by our own laws . . ." 1 Sim. (N.S.), at 331, 61 Eng. Rep., at 128) had been "most correctly decided," L.R., 3 Ch. App., at 85, but that the general rule there laid down was unnecessarily broad. He declined to apply the rule in *McRae* on the ground that "the presumed ignorance of the Judge as to foreign law . . . [had been] completely re-



moved by the admitted statements upon the pleadings, in which the exact nature of the penalty or forfeiture incurred by the party objecting to answer is precisely stated . . . , L.R., 3 Ch. App., at 85, and the further ground that the property subject to a forfeiture was "within the power of the United States," *id.*, at 87. See Mr. Justice Harlan's concurring opinion in *Murphy*, *supra* at 81-82 n.1.

*The King of Two Sicilies* and *McRae* are distinguishable upon the very grounds which the former primarily relied in reaching its holding. It thus appears that *McRae* did not overrule *King of Two Sicilies* on this point; but rather extended the general rule to apply in situations where there were real and substantial hazards of incrimination in a "foreign jurisdiction." The Court's opinion in *Murphy*, *supra* at 67, makes it abundantly clear how important these two factors were in its acceptance of the *McRae* rule:

"Moreover, the two factors relied on by the English court in *King of the Two Sicilies* were wholly inapplicable to federal-state problems in this country. The first—'The impossibility of knowing, as matter of law, to what cases the [danger of incrimination] may extend \* \* \*,' *supra*, at 60—has no force in our country where the federal and state courts take judicial notice of each other's law. The second—that 'in order to make the disclosure dangerous to the party who objects, it is essential that he should first quit the protection of our laws, and willfully go within the jurisdiction of the laws he has violated,' *supra* at 60-61—is equally inapplicable in our country where the witness is generally within 'the jurisdiction' of the State under whose law he claims danger of incrimination, and where, if he is not, the State may demand his extradition."

It thus appears that the *McRae* rule was adopted by the *Murphy* Court for the same reasons that *McRae* modified *King of Two Sicilies*, *supra*, i.e. because even though the latter case was "most correctly decided" in the circumstances the case presented, yet those circumstances were found not to apply to the United States, because of our concept of two independent sovereign governments within the same territorial framework. The Court's holding made no mention, as indeed it should not have, regarding what rule it thought obtained under facts similar to *King of Two Sicilies*, *supra*, e.g., the facts in the instant case on this point, because the resolution to that question was not properly before it. Thus, appellants statement that "it thus appears that this principle of law was accepted by the majority in *Murphy*" is at least open to serious doubt and probably incorrect.

This interpretation gains force upon examination of *In re Parker*, 411 F. 2d 1067 (10 Cir. 1969), cert. granted, judgment vacated as moot, *sub nom. Parker v. United States*, 397 U.S. 96 (1970). In that case the Court held that where a witness had been specifically granted immunity from both federal and state prosecution, the witness was not justified in refusing to answer questions on the ground that there was a danger of incrimination in Canada. In discussing *Murphy*, *supra*, Judge Lewis opined at 1070:

"It is true that Mr. Justice Goldberg, writing for the majority in *Murphy*, *supra*, traced the history and importance of the privilege against self-incrimination and in so doing indicated approval of some early English cases where the privilege was thought applicable to a 'foreign jurisdiction' or 'country.' But the Justice's reference to such cases was simply by way of argumentative analogy to this na-

tion's state-federal relationship and carries no further persuasion. The fifth amendment was intended to protect against self-incrimination for crimes committed against the United States and the several states but need not and should not be interpreted as applying to acts made criminal by the laws of a foreign nation. The ideology of some nations considers failure itself to be a crime and should provide punishment for the failure, apprehension or admission of a traitorous/saboteur acting for such a nation within the United States. In such a case the words 'privilege against self-incrimination,' engraved in our history and law as they are, may turn sour when triggered by the law of a foreign nation."

It is respectfully submitted that this holding is thoroughly consistent with *Murphy*, and should be followed in the instant case.

Appellant finally alleges that "world-wide dissemination of information" and "the well-known cooperation of police authorities in many nations" creates for him a "very real fear of ultimate prosecution" in foreign nations for foreign crimes. This line of reasoning, *ad reductio absurdum*, pushes the conjectural limits of a sort of international federalism to a fetish, and as such should be rejected by the honorable Court.

**(2) Appellant has demonstrated no real and substantial fear of foreign prosecution.**

The test for fear of self-incrimination was stated in *The Queen v. Boyes*, 1 B. & S. 311 (1861). The Queen's Bench held:

"that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. \* \* \* " Ibid. at 330-331.

This test has been fastly adhered to in the United States. *Brown v. Walker*, 161 U.S. 591, 599-600, (1896), *Heike v. United States*, 227 U.S. 131, 144 (1913), and see discussion in *Murphy v. Waterfront Commission*, *supra* at 60-63, 67-68. Thus, the New Jersey Supreme Court was merely following established precedent when it said "the danger [of foreign prosecution] in the case before us is too imaginary and unsubstantial to sustain a refusal to answer." *In re Zicarelli*, 55 N.J. at 270, 261 A. 2d at 140.

Appellant's substantial fear of incrimination, it is said is based upon the allegation that in a series of articles published by what he calls a magazine of "worldwide circulation," *Life Magazine* branded him as the "foremost internationalist" among criminals. Appellant's Brief at 39. This real fear of prosecution is further buttressed, it is said, by this commission's willingness to stipulate at the hearing before the judge holding appellant in contempt, that appellant had been the "object of very extensive publicity referring to him . . . as an 'internationalist' in crime." (Appendix, at 65a, 66a). It is respectfully suggested that these dangers are, in the words of the New Jersey Supreme Court, "imaginary and unsubstantial," and that the possible dangers inherent in these allegations are "so improbable that no reasonable man would suffer it to influence his conduct." *The Queen v. Boyes*, *supra*.



It is incumbent upon appellant to show why these dangers he calls real and substantial are so. He has tried and failed to convince the committing judge and the highest state court of the substantiality of these claims, and these judgments should be given great respect by this Court. Appellant has made no showing, nor even has he claimed, that the Commission has disseminated any of the information obtained from him at executive hearing to state and federal law enforcement authorities. Such a claim would be frivolous at any rate, since appellant answered no questions put to him, save his name, and no questions whatever were asked referring directly to foreign criminal activity. Moreover, N.J.S.A. 52:9M-15 forbids disclosure of any such information under pain of law. It reads:

Any person conducting or participating in any examination or investigation who shall disclose to any person other than the commission or an officer having the power to appoint one or more of the commissioners the name of any witness examined or any information obtained or given upon such examination or investigation, except as directed by the governor or commission, shall be adjudged a disorderly person.

And if it is objected to that this provision, coupled with others cited by appellant in the Commission's statute, *Appellant's Brief*, at 41, empowers the Commission to disseminate such information, it need only be rejoined that this Commission, in fact, has not done so and no claim or showing to the contrary has been maintained. Thus, any fears which appellant has regarding foreign prosecution are nothing more than ephemeral fantasies of an over-stretched imagination, and must therefore be considered without merit by this Court.

Appellant's final argument is based upon his fear of prosecution in Canada, which in turn is predicated on fear of extradition to that country (*Treaties in Force*, (Department of State Publication 8567) (1971)) upon matters which appellant admits were not even broached by the Commission when it questioned appellant in executive hearing. *Appellant's Brief*, at 40. If the basis of this fear seems illusory, which it clearly is, it is even more fanciful when the corresponding rule against self-incrimination in force in Canada is examined. The *Canada Evidence Act*, R.S.C. 1952, c. 307, §5, states:

(1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or or any person.

(2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in the giving of such evidence. R.S., c 59, s.5.

While this statute is federal law in Canada, the provincial courts have held that the Provinces are bound by

it and therefore cannot abridge it by statute. *Sweezy v. Crystal Chemicals Ltd. and Clark*, 38 D.L.R. 2d 505 (1963). And the Supreme Court of Canada long ago adopted what is tantamount to a Canadian *Murphy* rule in *Prosko v. Rex*, 63 S.C.R. 226 (Sup. Ct. Can. 1926). In *Prosko*, the Court said that the fact that incriminating admissions were made in the United States would have no bearing, *per se*, on their admissibility in Canada. The test for admissibility is *voluntariness*. If the statement was *not* voluntary, but rather coerced or compelled, it could not be admitted in Canada. The Court stated, at 229-230:

"It has long been established as a positive rule of English law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, . . . The principle is as old as Lord Hale." And see *Grant, Federalism and Self-Incrimination*, 5 U.C.L.A. L.Rev. 1, 10-11 (1958)

It thus appears that any fears which appellant has regarding possible prosecution in Canada based on statements given under an American grant of immunity are, apart from being imaginary, groundless. For it is clear that the Canadian authorities would be bound by their own rule against self-incrimination not to admit, in a Canadian Court, testimony compelled in a foreign nation. And since fear of prosecution in either Venezuela or the Dominican Republic is conceded to be non-existent by appellant *Appellant's Brief*, at 42-43, it is respectfully submitted that appellant's contention as to this point is without merit.

**CONCLUSION**

Wherefore, for all the foregoing reasons, appellee prays that N.J.S.A. 52:9M-17 be declared constitutional under the Fifth and Fourteenth Amendments and that the judgment of the court below be affirmed.

Respectfully submitted,

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**Supreme Court of the United States**

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Supreme Court U.S.  
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No. ~~81~~ **69-4**

**JOSEPH ARTHUR ZICARELLI,**

*Appellant,*

—v.—

**NEW JERSEY STATE COMMISSION OF INVESTIGATION,**

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. ~~565~~ **70-7**

**ALBERT SARNO and CHRIS CARDI,**

*Petitioners,*

—v.—

**ILLINOIS CRIME INVESTIGATING COMMISSION,**

*Respondent.*

ON CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION**  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1970

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No. 91

JOSEPH ARTHUR ZICARELLI,

*Appellant,*

—v.—

NEW JERSEY STATE COMMISSION OF INVESTIGATION,

*Appellee.*

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

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No. 565

ALBERT SARNO and CHRIS CARDI,

*Petitioners,*

—v.—

ILLINOIS CRIME INVESTIGATING COMMISSION,

*Respondent.*

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ON CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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**BRIEF OF THE AMERICAN CIVIL LIBERTIES  
(UNION AMICUS CURIAE**



## **Interest of Amicus\***

The American Civil Liberties Union is a nationwide, non-partisan organization engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty-year existence, the ACLU has been particularly concerned with those societal values embodied in the Fifth Amendment's Privilege Against Self-Incrimination.

The Fifth Amendment Privilege plays a central role in our accusatorial system of justice. It safeguards the individual against overbearing inquiries by the State. Yet, as reflected in these cases, it is once again under attack by legislatures and the courts.

The purpose of this brief is to identify the policies underlying the Privilege and to demonstrate that the requirement of full transactional immunity is the minimally tolerable erosion of the fundamental right of silence protected by the privilege.

## **Question Presented**

This brief is addressed solely to the question of whether the privilege against self-incrimination requires that the State grant full transactional immunity before it can compel a witness to testify.

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\* Letters of consent to the filing of this brief from the attorneys for the respective parties have been filed with the Clerk.

## ARGUMENT

### Summary of Argument

The Fifth Amendment was intended and has been construed to confer an absolute right to remain silent when subjected to incriminating inquiries. *Miranda v. Arizona*, 384 U.S. 436 (1966). In this respect, the values protected by the Fifth Amendment dovetail with the right of privacy embodied in the Fourth Amendment, as this Court recognized almost a century ago in *Boyd v. United States*, 116 U.S. 616 (1886). Together these guarantees afford a private enclave into which the state may not intrude, physically or inquisitorially. Accordingly, any legislative arrangement by which a man is compelled to speak is constitutionally suspect. The validity of any immunity statute must be judged against these premises.

In *Counselman v. Hitchcock*, 142 U.S. 547 (1892) this Court held that only complete transactional immunity is an adequate displacement of the right to remain silent. *Counselman* embodied a studied compromise between the theory that no device could be used to compel self-incrimination and the uncertainties of "use" immunity schemes. Since *Counselman*, transactional immunity has been held to be part of our "constitutional fabric" as the minimally acceptable erosion of the Privilege. Those Justices who opposed the *Counselman* Rule did so not because it afforded too much, but because it granted too little to compensate for compelled self-incrimination. See *Brown v. Walker*, 161 U.S. 591 (1896); *Ullmann v. United States*, 350 U.S. 422 (1956).

This Court's decision in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) is not a retreat from the *Counsel-*

man rule. *Murphy* was an *expansion* of Fifth Amendment protection, holding that one sovereign could make no use whatsoever of testimony compelled by another. *Murphy* did not disturb the settled rule that as between a witness and the sovereign which forces him to relinquish his privilege, complete transactional immunity is required. See, *Stevens v. Marks*, 383 U.S. 234 (1965); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965). Finally, anything less than full transactional immunity places too great a practical burden on the witness to insure that any future prosecution was not based on tainted evidence.

# I.

## **Constitutional framework: The Fifth Amendment privilege safeguards the right to remain silent.**

We begin our analysis of the issue in these cases by suggesting to the Court that the Fifth Amendment has always been thought to afford individuals the cherished right to remain silent. Accordingly, any device, be it immunity statute or truncheon, which operates to breach that silence and compel a man to confess criminal conduct runs afoul of the purpose of the constitutional privilege and impairs the societal policies which that privilege seeks to further.

As this Court has noted many times, the privilege was incorporated into the Constitution at a time when the oath *ex officio* utilized by England's Star Chamber and High Commission was recent history. John Lilburn's historic battle against such oaths led to their repeal in England.

The Fifth Amendment privilege was intended to have the same effect here. It was designed to safeguard a man's right to resist compulsion applied in an attempt to force him to reveal past criminal conduct. See, *Miranda v. Arizona*, 384 U.S. 436, 458-60 (1966). And the inquiries were usually directed at the "crimes" of political or theological dissent. In effect, the privilege was intended to prevent the state from rummaging through the closets of the mind in search of the secrets contained therein.

In this respect, the values safeguarded by the Fifth Amendment privilege dovetail with those protected by the Fourth Amendment and together provide a right of privacy against governmental intrusion. The intimate relationship between these two constitutional safeguards was clearly enunciated almost a century ago in *Boyd v. United States*, 116 U.S. 616 (1886). The case involved a statute designed to compel the production of incriminating documents, and the defendant objected on both Fourth and Fifth Amendment grounds. Both claims were sustained. This Court quoted at great length from the historic English decision in *Entick v. Carrington*, 19 How. St. Tr. 1029. Lord Camden had surveyed the principles of the common law and concluded: "[i]t is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle." (Quoted in *Boyd v. United States*, *supra*, at 629) The Court summed up these principles in the following manner,

The principles laid down in this opinion affect the very essence of constitutional liberty and security.



They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other. *Id.* at 630.

The Court concluded that "any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." *Id.* at 631-32.

This recognition, that the Fourth and Fifth Amendments and the interests they protect "run almost into each other"

and prevent extorting a man's oath, has been repeatedly reflected in the Court's decisions. For example, in *Malloy v. Hogan*, 378 U.S. 1 (1964) the Court concluded that the constitutional privilege guarantees "the right of a person to remain silent, unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Id.* at 8. The history of the privilege and the policies it serves was eloquently characterized by Chief Justice Warren,

Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *United States v. Grunewald*, 233 F2d 556, 579, 581-582 (Frank, J., dissenting), rev'd, 353 US 391 (1957). We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values, *Murphy v. Waterfront Comm'n*, 378 US 52, 55-57, note 5 (1964); *Tehan v. Shott*, 382 US 406, 414-415, note 12 (1966). All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," 8 Wigmore, *Evidence* 317 (McNaughton rev 1961), to respect the inviolability of the human personality, our accusa-

tory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Chambers v. Florida*, 309 US 227, 235-238 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *Miranda v. Arizona*, *supra* at 460.

## II.

**Full transactional immunity is the minimally acceptable substitute for the Fifth Amendment privilege to remain silent.**

We have set forth this analysis of the purposes of the Fifth Amendment privilege because any immunity statute must be evaluated against the premise that the privilege safeguards personal privacy and the right to remain silent. Since this Court first considered the validity of immunity statutes in *Counselman v. Hitchcock*, 142 U.S. 547 (1892), there have been essentially two theories competing for acceptance. One theory holds that no immunity statute is constitutionally sufficient to displace the privilege and compel a man to speak. This view was enunciated in 1807 by Mr. Chief Justice Marshall, almost commanded a majority in *Brown v. Walker*, 161 U.S. 591 (1896), and was articulated by Justice Douglas, joined by Justice Black in *Ullmann v. United States*, 350 U.S. 422 (1956).

This absolute position (with which we fully concur) has not prevailed. Instead, this Court has adopted the rule that a grant of immunity from prosecution is the minimally acceptable substitute for the privilege. However, the doctrinal tension has always been between the minority view, that the privilege and its underlying policies affords the complete right to silence, and the prevailing view that statutes which grant transactional immunity are sufficient. Thus, the debate has always been between silence and transactional immunity, not between transactional immunity and something less. The transactional immunity rule has prevailed not over the argument that it afforded too much protection, but over the objection that it gave too little.

**A. Historical Background—The pre-Counselman Understanding.**

The view that the Fifth Amendment privilege affords an absolute right of silence with regard to incriminating inquiries is supported by the language of the privilege and the history of its origins. Justice Brennan has surveyed the history as follows,

Historians have noted that the clause itself is absolute and may not originally have been viewed as allowing the government to compel men to incriminate themselves if it only promised not to prosecute them for the crimes revealed:

"The clause by its terms also protected against more than just 'self-incrimination,' a phrase that had never been used in the long history of its origins and development. The 'right against self-incrimination' is short-hand gloss of modern origin that implies a re-



striction not in the constitutional clause. The right not to be a witness against oneself imports a principle of wider reach, applicable, at least in criminal cases, to the self-production of any adverse evidence, including evidence that made one the herald of his own infamy, thereby publicly disgracing him.

“The state courts of the framers’ generation followed the extension of the right to cover self-infamy as well as self-incrimination, although the self-infamy rule eventually fell into disuse.” L. Levy, *Origins of the Fifth Amendment*, 427, 429 (1968). *Piccirillo v. New York*, 27 L. Ed. 2d 596, 606 n. 7 (1971) (dissenting opinion).

The purpose of the privilege, as reflected in its absolute language, was to guarantee that one need not speak at all concerning incriminating or infamous matters. This understanding is manifest in Mr. Chief Justice Marshall’s decision in the trial of Aaron Burr,

... It is certainly not only a possible, but a probable, case, that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but all other facts without it might be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compelled to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.

What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that might form a necessary and essential part of a crime, which is punishable by the laws . . .

[I]n such a case, the witness must himself judge what his answer will be; and if he say, on oath, that he cannot answer without accusing himself, he cannot be compelled to answer. 1 *Burr's Trial*, 244-45.

Marshall's view, that the privilege afforded the right not to speak at all concerning incriminating matters, predated the modern immunity statutes, first enacted in 1857. Those resulted in so-called "immunity baths," which allowed witnesses to flock to Congress, confess their past indiscretions, and obtain freedom from prosecution. See Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 Yale L.J. 1568, 1571-72 (1963). These statutes were quickly supplanted by restrictive immunity provisions. But those provisions were not utilized for two decades until the passage of the Interstate Commerce Act. *Id.* at 1572-73. Investigations under that Act quickly led to this Court's decision in *Counselman v. Hitchcock*, *supra*, unanimously invalidating the immunity statute for not affording protection equivalent to the Fifth Amendment.

**B. Transactional Immunity—The Compromise Between the Right to Absolute Silence and the Uncertainties of “Use” Immunity.**

“[N]o statute which leaves the party or witness subject to prosecution after he answers the crinating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States.” *Counselman v. Hitchcock*, *supra*; at 585. That was the opinion of this Court when first confronted with the question of the constitutionality of a federal immunity statute.<sup>1</sup>

The statutory provision affording less than complete immunity was held to be constitutionally defective. Writing for a unanimous court, Justice Blatchford announced that “[i]t is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect.” *Id.* at 585. The Court held that the immunity provision did not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and was not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, “must afford absolute immunity against future prosecution for the offense to which the question relates . . .” *Id.* at 586.

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<sup>1</sup> The statute provided, in part, that:

No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. Act of Feb. 25, 1868, Rev. Stat. Sec. 860.

Although *Counselman* presented this Court with its first opportunity to examine the constitutionality of an immunity statute, the protection afforded to the witness was not unreasoned nor was it unnecessarily broad. Rather, the *Counselman* decision resulted from a compromise which attempted to balance the rights of the individual and the interests of the government without excessive sacrifice of the policy considerations underlying the privilege against self-incrimination.

The court in *Counselman* considered Chief Justice Marshall's suggestion, in the *Aaron Burr* case, that the privilege against self-incrimination was tantamount to a right to remain silent. Marshall, certainly not one to denigrate the interests of the state, nevertheless concluded that "the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punished by the laws" (quoted in *Counselman v. Hitchcock*, *supra*, at 566). The conclusion to be drawn from Marshall's position was that any compulsion to testify, regardless of the scope of the immunity provided, would erode the right to remain silent.

Antithetical to the Marshall equation, however, was the position that had been adopted by the New York Court of Appeals in *People v. Kelly*, 24 N.Y. 74 (1861). *Kelly* involved a New York immunity statute which compelled accomplice testimony but also prohibited the use of that compelled testimony in "any prosecution or proceeding civil or criminal." It was contended that this statute violated a provision of the New York Constitution which declared that "no person shall be compelled, in any criminal case, to be a witness against himself." The New York Court of Appeals upheld the constitutionality of the stat-



ute. The *Kelly* case subsequently served as the progenitor of a line of state decisions which, during the second half of the nineteenth century, validated the constitutionality of "use" immunity statutes.

A third position developed, however, which adopted a "well conceived middle path" between the suggestion that no immunity statute could be constitutionally coextensive with the privilege and the view that a "use" immunity provision could satisfy the requirements of the Fifth Amendment. This middle path was first announced in *Emery's Case*, 107 Mass. 172 (1871), which held that a witness could be compelled to testify but only if "first secured from future liability . . . as fully and extensively as he would be secured by availing himself of the privilege accorded by the Constitution." *Id.* at 185. This security, the court found, "cannot be accomplished so long as he [the witness] remains liable to prosecution criminally for any matters or causes in respect of which his testimony shall relate." *Ibid.* See also, *Cullen v. Comm.*, 24 Gratt 624 (Virginia, 1873) ("before [the constitutional privilege] can be taken away [by the Legislature], there must be absolute indemnity provided, nothing short of complete amnesty to the witness—an absolute wiping out of the offence as to him, so that he could no longer be prosecuted for it—would furnish that indemnity." *Id.* at 635; *State v. Nowell*, 58 N.H. 314 (1878) ("[t]he legislature, having undertaken to obtain the testimony of the witness without depriving him of his constitutional privilege of protection must relieve him of all liabilities on account of the matters which he is compelled to disclose; otherwise, the statute would be ineffectual. He is to be secured against all liability to future prosecution as effectually as if he were wholly innocent.

This would not be accomplished if he were left liable to prosecution criminally for any matter in respect of which he might be required to testify." *Id.* at 315).

In adopting the doctrine represented by *Emery's Case*, that full prosecutorial immunity must be conferred, this Court was prompted substantially by the need to reconcile the constitutional validation of any immunity statute with the position adopted a few years earlier in *Boyd v. United States*, *supra*. *Boyd* had revealed the fundamental confluence between the Fourth and Fifth Amendments, demonstrating that they "run almost into each other." *Boyd* showed that both Amendments were essentially designed to protect the privacy and security of the individual from excessive incursions by the government. Justice Blatchford in *Counselman*, quoting extensively from the majority opinion in *Boyd*, was not unmindful of the essential importance of this "indefeasible right of personal security."

In sum, although the Court in *Counselman* attempted to satisfy the state's interest in seeking information, it sought not to sacrifice the individual's right of privacy and security. *Counselman* took the middle path between an unfettered right to remain silent and the substantial erosion of the Fifth Amendment which would have occurred by upholding the validity of use immunity statutes. The *Counselman* "compromise" indicated that immunity statutes would be upheld only so long as they provided full "prosecutorial" protection.

**C. Post-Counselman: Transactional Immunity Emerges as the Rule Over Frequent Objections That No Immunity Statute Can Displace the Privilege.**

In response to the constitutional requirements suggested by the opinion in *Counselman*, Congress enacted in 1893 a "transactional" immunity statute. See 27 Stat. at L. 443 (1893).<sup>2</sup> Three years later, a challenge to the validity of this statute reached the Supreme Court in the case of *Brown v. Walker*, *supra*. The Court by a narrow 5-4 vote upheld the constitutionality of the transactional immunity provision. Writing for the majority of the court, Justice Brown found that the transactional statute sufficiently protected a witness to satisfy the requirements of the Fifth Amendment. The majority reasoned that the Fifth Amendment privilege was susceptible of two interpretations. First, it could be construed literally to authorize a witness to refuse to incriminate himself. Such an interpretation would, in effect, mean that no one could be compelled to testify to a material fact in a criminal case unless by choice. The other construction would bar any prosecution related to the testimony given, because "... if no such prosecution be possible—in other words, if his testimony operate as a complete pardon for the offence to which it relates—a statute absolutely securing him such immunity from prosecution would satisfy the demands of the clause in question." 161 U.S. at 595. The majority concluded that "if the statute does afford . . . immunity against future prosecution the witness will be compellable to testify." *Id.* at 594.

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<sup>2</sup> The statute afforded protection not only against prosecution, but also against the witness being subjected to "a penalty or forfeiture."

Four Justices dissented. They objected to the statute not because it provided protection that was unnecessarily broad, but because the protection afforded by the transactional provision was not broad enough. They concluded that no immunity statute could displace the values protected by the Fifth Amendment.

Justice Shiras, with whom Justices Gray and White joined in dissent, reasoned that various historical and practical considerations undercut any immunity provision:

It is too obvious to require argument that, when the people of the United States, in the 5th Amendment to the Constitution, declared that no person should be compelled in any criminal case to be a witness against himself, it was their intention, not merely that every person should have such immunity, but that his rights thereto should not be devested or impaired by any act of Congress. *Id.* at 610.

He further contended that "the very fact that the founders of our institutions, by making the immunity an express provision of the Constitution, disclosed an intention to protect it from legislative attack, creates a presumption against *any* act professing to dispense with the constitutional privilege." *Id.* at 621.

Shiras found the transactional statute deficient in many respects. First, the enactment did not really protect the witness from prosecution. It merely enabled the witness to plead the prior compulsion as a defense against a subsequent indictment. As Shiras demonstrated, under the statute the witness will have,

been prosecuted, been compelled, presumably, to furnish bail, and put to the trouble and expense of em-



ploying counsel and furnishing the evidence to make good his plea. It is no reply to this to say that his condition, in those respects, is no worse than that of any other innocent man who may be wrongfully charged. The latter has not been compelled, on penalty of fine and imprisonment, to disclose under oath facts which have furnished a clue to the offense with which he is charged. 161 U.S. at 621-22.

Secondly, it is not "a matter of perfect assurance that a person who has compulsorily testified . . . will be able, if subsequently indicted for some matter or thing concerning which he testified, to procure the evidence that will be necessary to maintain his plea. No provision is made in the law itself for the preservation of evidence. Witnesses may die or become insane, and papers and records may be destroyed by accident or design." *Id.* at 622. In addition, Shiras contended that under the statute, the witness is relinquishing his privilege of silence in exchange for which, by testifying, "he is subjected to the hazard of a charge of perjury." *Ibid.* Finally, Justice Shiras argued that the statute was deficient because "the effect of the provision . . . as a protection to the witness, is purely conjectural and uncertain." *Id.* at 627. Thus Shiras concluded that the transactional immunity statute did not fully supplant the right to remain silent. For it did not leave the witness in the same position as if he had never testified. According to the dissenting votes in *Brown v. Walker*, the transactional statute constituted an unconstitutional erosion of the Fifth Amendment.

While Justice Shiras attacked the practical sufficiency of immunity statutes, Justice Field in a separate dissenting

opinion adopted the position that no immunity statute, however broad in scope or closely drawn, could supplant the right against self-incrimination. According to Field, the Fifth Amendment was intended to afford to the witness "a shield of absolute silence." And, said Field, "[n]o different protection from that afforded by the amendment can be substituted in place of it." *Id.* at 630. Field further contended that "[t]he amendment also protects [the witness] from all compulsory testimony which would expose him to infamy and disgrace, though the facts might not lead to criminal prosecution." *Id.* at 631. Certainly no statute could sufficiently immunize an individual from the "essential and inherent cruelty of compelling a man to expose his own guilt" and from public disapprobation once that person has admitted to the commission of an illegal or immoral act. Field therefore recurred to a formidable line of authority which contended that no statutory enactment could infringe upon the individual's unfettered right to remain silent and the concomitant right that the individual should suffer no penalty for his silence.

The transactional immunity standard suggested by *Counselman* and solidified by *Brown v. Walker* has been consistently reaffirmed as the maximum erosion of the right to remain silent that will be tolerated by the Fifth Amendment.

The issue as to the necessary scope of an immunity statute was raised in *Hale v. Henkel*, 201 U.S. 43 (1906). In that case a witness had refused to testify before a grand jury and was therefore cited for contempt. The witness contended that the transactional immunity under which he was being offered protection, was not sufficiently broad to supplant his privilege. This court, however, upheld the

contempt citation and reasserted the transactional standard promulgated by *Counselman* and by *Brown v. Walker*.

Further induration of the *Counselman* rule was accomplished by Justice Brandeis in *McCarthy v. Arndstein*, 266 U.S. 34 (1924). Writing for a unanimous court, Brandeis held that Congress could not compel a bankrupt individual to relinquish his Fifth Amendment right to remain silent unless it provided "complete immunity from a prosecution." *Id.* at 42. And in *United States v. Murdock*, 284 U.S. 141 at 149 (1931)<sup>3</sup> this court again declared that:

The principle established is that full and complete immunity against prosecution by the government compelling the witness is equivalent to the protection furnished by the rule against compulsory incrimination. [Citing for support of the above proposition] *Counselman v. Hitchcock*, 142 U.S. 547; *Brown v. Walker*, 161 U.S. 591; *Jack v. Kansas*, 199 U.S. 372; *Hale v. Henkel*, 201 U.S. 43.

*United States v. Monia*, 317 U.S. 424 (1943) also presented the Court with the opportunity to review and to reaffirm the *Counselman* rule. Again the Court concluded that *Counselman* "indicated clearly that nothing short of absolute immunity would justify compelling the witness to testify if he claimed his privilege." *Id.* at 428. Even in dissent, Justice Frankfurter reaffirmed the rulings in *Counselman* and in *Brown v. Walker*. In discussing the *Brown* decision, Frankfurter conceded that "[t]here was no in-

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<sup>3</sup> To the extent that *Murdock* held that fear of state prosecution did not justify a refusal to answer questions in an inquiry by federal officials, that holding was overruled by *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

dication of any belief that Congress had given anything more than it had to give—and indeed, only a bare majority of the Court thought that the statute had given as much as the Constitution required.” *Id.* at 434. In *Adams v. Maryland*, 347 U.S. 179, 182, (1954) Justice Black, delivering the opinion of the Court, stated that: “in *Counselman v. Hitchcock* . . . this Court held that an act not providing ‘complete’ immunity from prosecution was not broad enough to permit a federal grand jury to compel witnesses to give incriminating testimony.”

Finally, in *Ullmann v. United States*, 350 U.S. 422 (1956), the court was again called upon to deal with the issue of the constitutionality of a transactional immunity provision and to review the line of cases validating such legislation. The statute at issue in *Ullmann* was the Immunity Act of 1954, 68 Stat. 745, 18 U.S.C. (Supp. II) Sec. 3486, which effectively compelled the testimony of a witness, in any case, “involving any interference with . . . the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy . . .”

Justice Frankfurter, writing for a majority of the Court, upheld the constitutionality of the statute and characterized the standard set forth in *Brown v. Walker* as “part

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\* The legislation also provided that:

[N]o such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court.

This statute was typical of the federal immunity statutes until the passage of the Organized Crime Control Act of 1970, 18 U.S.C. Secs. 6001-6003.



of our constitutional fabric." Frankfurter discussed the development of the doctrine promulgated in *Brown v. Walker*, and he emphatically reasserted the precedential firmness of that ruling:

... in *Counselman v. Hitchcock*, 142 US 547 a unanimous Court had found constitutionally inadequate the predecessor to the 1893 statute because the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony. It was with this background that the 1893 statute, providing complete immunity from prosecution, was passed and that *Brown v. Walker* was argued and decided. As in *Counselman*, appellant's numerous arguments were presented by James C. Carter, widely acknowledged as the leader of the American bar. The Court was closely divided in upholding the statute, and the opinions reflect the thoroughness with which the issues were considered. Since that time the Court's holding in *Brown v. Walker* has never been challenged; the case and the doctrine it announced have consistently and without question been treated as definitive by this Court, in opinions written, among others, by Holmes and Brandeis, JJ. See, e.g., *McCarthy v. Arndstein*, 366 US 34, 42; *Heike v. United States*, 227 US 131, 142. The 1893 statute has become part of our constitutional fabric . . . *Shapiro v. United States*, 335 U.S. 1, 6. *Ullmann v. United States*, supra, at 436-38.<sup>5</sup>

<sup>5</sup> In a footnote, Justice Frankfurter briefly summarized the arguments of James C. Carter as Carter contended that the transactional immunity statute was inadequate to supplant the right to

Justices Douglas and Black dissented. They advocated adoption of the view of the *Brown* dissenters "that the right of silence created by the Fifth Amendment is beyond the reach of Congress." *Id.* at 440.

After noting that the disabilities imposed upon one forced to reveal the type of information about political associations sought in *Ullmann* were similar, if not more egregious, than the "forfeitures" involved in *Boyd v. United States, supra*, Justice Douglas' opinion observes that "[w]isely or not, the Fifth Amendment protects against the compulsory self-accusation of crime without exception or qualification." *Id.* at 443. It does so to interdict three kinds of mischief. The first is the risk of prosecution

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remain silent. That summary of Carter's arguments is recited herein:

He urged that the statute left the witness in a worse condition because it did not abrogate the crime for which he was given immunity; that the constitutional safeguard goes toward relieving the witness from the danger of an accusation being made against him while the statutory immunity forces him to supply evidence leading to an accusation and provides only a means for defense; that the statute puts a heavy burden on petitioner, if he is indicted, to prove that he had testified concerning the matter for which he was indicted; that a citizen is entitled to the very thing secured to him by the constitutional safeguards and not something which will probably answer the same purpose; that the statute subjects him to the infamy and disgrace from which he was protected by the constitutional safeguard; that the statute did not protect him from prosecution for a state crime; that even if it were so interpreted, Congress had no power to grant such protection; that the immunity granted was too narrow since it only extended to matters concerning which he was called to testify and not to all matters related to the testimony given; that to be able to claim the privilege the witness would virtually have to reveal his crime in order that the court could see that the statute failed to protect him; and finally that the statute was an attempt to exercise the power of pardon which was a power not delegated to Congress. 350 U.S. at 437 fn. 13.

and all the attendant uncertainties and disabilities discussed by Mr. Justice Shiras in *Brown v. Walker*. Second, the privilege is "a safeguard of conscience and human dignity and freedom of expression as well." *Id.* at 445. The Framers of the Constitution intended to provide more than just protection against prosecution or conviction; they created a "federally protected right to silence." *Id.* at 446. English and colonial history, commencing with the trial of John Lilburn, gave content to the privilege and demonstrated that one of its "great purposes" was "to prevent any Congress, any court, and any prosecutor from prying open the lips of an accused to make incriminating statements against his will." *Id.* at 448-49. Finally, "this right of silence, this right of the accused to stand mute" is designed to protect against compulsory testimony which would expose the accused to infamy and disgrace, to "practical outlawry". *Id.* at 449-50. Justice Douglas concluded his review of the purposes of the Fifth Amendment privilege as follows:

The critical point is that the Constitution places the right of silence *beyond the reach of government*. The Fifth Amendment stands between the citizen and his government. *Id.* at 454 (emphasis in original).

The dissent by Justices Douglas and Black represents a persistent and persuasive strain of judicial authority which continues to maintain that even the transactional immunity standard constitutes an excessive and intolerable erosion of the Fifth Amendment.

In sum, from *Counselman* through *Ullmann* there was no authority whatever for the proposition that something less

than full transactional immunity could adequately supplant the Fifth Amendment privilege. Transactional immunity has consistently been regarded as the minimal protection that could be afforded to a witness. To the extent that there was any dissent from the *Counselman* rule, such opposition has traditionally argued that transactional immunity did not provide enough protection. Until *Murphy v. Waterfront Commission, supra*, it was never seriously contended that *Counselman* provided too much protection when measured against the Fifth Amendment right to remain silent.

### III.

**Where one state jurisdiction is involved, transactional immunity is the necessary and proper requirement, and *Murphy v. Waterfront Commission* is not to the contrary.**

The recent suggestion that the Fifth Amendment only requires the inquiring sovereign to grant use immunity in order to abrogate the witness' privilege is premised on certain language in *Murphy v. Waterfront Commission, supra*. See, *Uniformed Sanitation Men's Assn. Inc. v. Commissioner of Sanitation*, 426 F.2d 619 (2d Cir. 1970); *Kastigar v. United States*, — F.2d —, 39 L.W. 2562 (9th Cir. 1971), *cert. granted*, 39 U.S.L.W. 3511. But *Murphy*, properly read, is consistent with the view that as between the witness and a state nothing less than full transactional immunity will satisfy the Fifth Amendment.

In *Murphy*, the inquiring jurisdiction had offered the witness full transactional immunity in exchange for his testimony. The witness protested that under the then-existing rule of dual sovereignty, he was not protected against prosecution by the federal government or by any



*Feldman v. United States*, 322 U.S. 487 (1944); *United* other states: See *Knapp v. Schweitzer*, 357 U.S. 371 (1958); *States v. Murdock*, *supra*. Agreeing with the petitioner, this Court held that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." 378 U.S. at 79. In so holding, this Court discarded the dual sovereign doctrine. Considerations of federalism had formed the basis of that doctrine: the inapplicability of the Fifth Amendment's right against incrimination to the states, the existence of the "silver platter" doctrine allowing use of evidence unconstitutionally seized by state authorities in a federal criminal trial, the inability of the states to grant immunity from prosecution by either the federal or other state governments, and the need of the federal government and the states for broad powers of investigation to effectively carry out their duties of regulating and preventing crime. See *Jack v. Kansas*, 199 U.S. 372 (1905); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Feldman v. United States*, *supra*; *Knapp v. Schweitzer*, *supra*; Note, *In re Koota: The Scope of Immunity Statutes*, 61 Nw. U. L. Rev. 654, 657, n. 5 (1966).

However, once the Court determined in *Elkins v. United States*, 364 U.S. 206 (1960), that evidence seized unconstitutionally by state authorities could not be used in federal criminal trials over the defendant's timely objection and in *Mallory v. Hogan*, 378 U.S. 1 (1964), that the Fifth Amendment right against self-incrimination was binding on the states, the dual sovereign doctrine lost its theoretical justification. See, Comment, *Self-Incrimination and the*

*State: Restriking the Balance*, 73 Yale L.J. 1491, 1493 (1964). Therefore, in *Murphy*, the court was faced with the problem of fashioning an immunity rule for the *interjurisdictional* situation which would accommodate those practical considerations of federalism which still remained:

"Since a state cannot insulate a witness from foreign prosecution by a grant of immunity, the complete abandonment of the dual sovereignty doctrine would prohibit states from constitutionally compelling witnesses to give testimony which might incriminate under laws of other jurisdictions. This could well represent a serious limitation on the state's ability to investigate." Comment, *Self-Incrimination and the State: Restriking the Balance*, *supra* at 1493.

As Justice White noted in his concurring opinion,

"Whenever access to important testimony is barred by possible state prosecution, the State can, at its option, remove the impediment by a grant of immunity; but if the witness is faced with prosecution by the Federal Government, the State is wholly powerless to extend immunity from prosecution under federal law in order to compel the testimony. *Murphy v. Waterfront Commission*, *supra* at 97.

The problem also remained of allowing the questioning jurisdiction to make prosecutorial decisions for the non-questioning jurisdiction. As has been pointed out:

... A sovereign can make its own self-imposed choice as to whether it is willing to forego subsequent prosecution in exchange for the information obtained. But it is wrong both in principle and practice to permit

one jurisdiction to make this decision for another, which could be the result if complete 'immunity from prosecution' in all jurisdictions were the constitutional result of one jurisdiction's compulsion of testimony. The entire basis of the federal system rests upon the sovereignty theory—that each sovereign should be free to function without restrictions imposed by another sovereign. Note, *In re Koota: The Scope of Immunity Statutes*, *supra* at 660-661 (1966).

In *Murphy* the Court accommodated these important state and federal interests by fashioning a rule which barred subsequent use in another jurisdiction of the compelled testimony or its fruits. By so doing, the Court was able to preserve the first jurisdiction's right to secure testimony in exchange for a grant of transactional immunity. It also protected the interests of the secondary jurisdiction by allowing it to make its own determination as to whether to prosecute the witness on the basis of independently obtained evidence. The *Murphy* rule, then, governs only inter-jurisdictional situations by leaving the witness and the noninquiring jurisdiction in the same position as if the witness had never testified. See *Murphy v. Waterfront Commission*, *supra* at 79, 101. *Adams v. Maryland*, 347 U.S. 179, 185 (concurring opinion of Justice Jackson). The witness is not subjected to having his testimony or its fruits used by the jurisdiction which did not grant him immunity—a windfall for that jurisdiction—and protects him from being whipsawed between jurisdictions. Furthermore, the nonquestioning jurisdiction is not bound by the decision of the other that it is more valuable to gain information from the witness than to prosecute him.

Consequently, *Murphy* did not *sub silentio* overrule *Counselman* or set forth a rule for intrajurisdictional cases. In *Re Korman*, — F.2d —, 39 L.W. 2681 (7th Cir. 5/20/71) (holding *Counselman* is still the rule and invalidating the new federal immunity statute for failing to provide transactional immunity). As has been discussed previously, the rule in *Counselman*, that transactional immunity is required as between the questioning jurisdiction and the witness is of continuing vitality.

Moreover, since *Murphy*, this Court has reaffirmed the *Counselman* rule in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 80 (1965), specifically noting that a federal immunity statute was invalid because it did not provide "absolute immunity against future prosecution for the offense to which the question relates." See also, *Stevens v. Marks*, 383 U.S. 234, 244-245, 249-50 (1965) (where this Court found no need to reconsider the *Counselman* rule in regard to the inquiring sovereign).

Accordingly, *Murphy* applies only to situations involving more than one jurisdiction and has no applicability to cases involving only one sovereign:

*Murphy*, consequently, broadened rather than restricted the protection of the Fifth Amendment's privilege against self-incrimination. The reason the Court extended the protection of the privilege in a cross-jurisdiction situation only to use of the compelled testimony and its fruits and not to prosecution immunity was out of considerations of federalism. Thus it minimized interference with the law enforcement prerogatives of the non-questioning jurisdiction." In the *Matter of the Grand Jury Testimony of Joann Kinoy*, — F.S. —, 39 L.W. 2427 (S.D.N.Y. 1971).



There is nothing inconsistent between the *Murphy* exclusionary rule applicable to the intergovernmental situation and the continued vitality of the transactional immunity rule to govern the parameters and the relationship between the witness and the inquiring sovereign. The latter situation is, of course, the one involved here.

The transactional immunity rule reflects a constitutional compromise between the rights of the witness and the law enforcement and investigatory needs of the state. To the extent that the *Murphy* rule suggests that "use and fruits" immunity is the appropriate standard with regard to a non-inquiring secondary sovereign, it is an exception to the transactional immunity rule; an exception based on the realities of federalism and on the realization that although one state must grant transactional immunity, that grant should not bind other states or the federal government. Consequently, if multi-jurisdictional transactional immunity were required, no state could offer it, and thus no state would be able to inquire into incriminating areas. The *Murphy* rule was an understandable reconciliation of the interests involved. And, of course, *Murphy* was an extension of the privilege because it overruled the decisions which held that no immunity was required as against the non-inquiring sovereign.

It would be anomalous, indeed, to hold that a decision which extended the availability of the privilege contained the seeds of its destruction. See, *In Re Korman, supra*; *In the Matter of the Grand Jury Testimony of Joann Kinoy, supra*. It partakes of throwing out the baby with the bath water to suggest that because *Murphy* did not require that transactional immunity be granted by all sover-

eigns, then transactional immunity need not be conferred by any sovereign, even the one that compels the witness to yield his right to remain silent. In the *Murphy* situation, the non-inquiring sovereign has not compelled the witness to reveal criminal activities and to suffer the criminal and other consequences of such a confession, and, so long as an exclusionary rule applies, it can arguably be said that the witness and the non-inquiring sovereign are in the same position as before the question was asked. As Justice Brennan has noted, that is simply not true as between the witness and the sovereign that compels him to speak,

The individual has been compelled to incriminate himself, and if he is granted only use immunity, compelled to do so in matters for which he may ultimately be prosecuted. Even from the standpoint of the State it clearly is not in the same position that it would have been had it not compelled the witness to testify. It has obviously obtained information, which may help it to pursue its general investigation, as well as its specific investigation of others. Whether that information will enable the investigation to generate enough steam and continue long enough to produce "independent" evidence incriminating the individual originally compelled to testify is an open question. In short, use immunity literally misses half the point of the privilege, for it permits the compulsion without removing the criminality. *Piccirillo v. New York*, 27 L. Ed. 2d at 608-09.

This Court has recognized since *Counselman* that the minimally fair bargain between the inquiring government and the witness is the one embodied in the requirement of

transactional immunity. The individual surrenders his right to remain silent and is forced to reveal criminal conduct. In exchange for withdrawing the constitutional privilege and acquiring evidence, the state is obligated to grant the witness immunity from prosecution for the transaction about which he testified. Anything less than an immunity from prosecution—a pardon—does not comport with the wording, history or policies of the privilege.

Requiring transactional immunity is fair in the practical sense as well. As Justice Brennan has noted, the "uncertainties of the fact-finding process argue strongly against 'use' immunity and in favor of transactional immunity." *Piccirillo v. New York*, *supra* at 609; see also *Murphy v. Waterfront Commission*, *supra* at 703 (concurring opinion of Justice White). Anything less than transactional immunity places a burden on the witness to attempt to insure that any subsequent prosecution relating to the matters testified to was, in fact, based on an independent source. See *In the Matter of the Grand Jury Testimony of Joann Kinoy*, *supra*. Transactional immunity provides the kind of certainty to which the witness, as well as the court, should be entitled:

... the State may not substitute for the privilege against self-incrimination an intricate scheme for conferring immunity and thereafter hold in contempt those who fail fully to perceive its subtleties. A witness has, we think, a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him. *Stevens v. Marks*, *supra* at 246.

Transactional immunity has been held to be a part of our "constitutional fabric" since *Counselman*. It has been the rule in almost all the states. See Appendix B to Petitioner's Brief in *Piccirillo v. New York*, *supra*. Until very recently, it has been the standard embodied in over forty federal immunity provisions. The minimally acceptable constitutional rule was succinctly stated by Justice Brennan,

"... the Fifth Amendment's privilege against self-incrimination requires that any jurisdiction which compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony." *Piccirillo v. New York*, *supra* at 605.



## CONCLUSION

For the reasons set forth above, the decisions below should be reversed.

Respectfully submitted,

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Supreme Court U.S.

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1970

No. 69-4

JOSEPH ARTHUR ZIGARELLI,

*Appellant,*

vs.

THE NEW JERSEY STATE COMMISSION OF  
INVESTIGATION,

*Appellee.*

On Appeal from the Supreme Court of New Jersey

BRIEF FOR THE STATE OF NEW JERSEY,  
AMICUS CURIAE

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1970

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**No. 91**

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**JOSEPH ARTHUR ZICARELLI,**  
*Appellant,*

*vs.*

**THE NEW JERSEY STATE COMMISSION OF  
INVESTIGATION,**  
*Appellee.*

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**On Appeal from the Supreme Court of New Jersey**

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**BRIEF FOR THE STATE OF NEW JERSEY,  
AMICUS CURIAE**

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**Statement of Interest of the *Amicus Curiae***

The State of New Jersey, *amicus curiae*, by its Attorney General, respectfully submits this brief in the above-captioned appeal in support of the position advanced by the appellee, State Commission of Investigation.

One of the principal purposes of the *amicus curiae* in participating in this case is to demonstrate to this Court that the interests of the administration of criminal justice are enhanced by the ability to employ "use plus fruits" immunity, as embodied in N.J.S.A. 52:9M-17.

It is the view of the *amicus curiae* that such an immunity formula, by its own terms, offers the same protection as is afforded by the Fifth Amendment privilege against self-incrimination. The reality of this protection can be reliably guaranteed by the exclusionary rules of evidence developed by this Court in the last fifty years. In light of this, it would be illogical/as well as socially undesirable to require that one compelled to testify receive immunity from prosecution for violations arising out of the transactions about which he is compelled to testify.

In no other context has it been suggested that the Fifth Amendment's protection extends this far. There being no conceptual or<sup>a</sup> practical reason why such protection is necessary to insure the witness that his compelled testimony, or evidence derived therefrom, will not be used against him, it is plain that such an immunity is wastefully broader than the privilege it seeks to supplant.

The foregoing conclusion is well illustrated by the present case. Appellant has stipulated to his notoriety in the area of organized crime. (App's Br. pp. 6, 40). He is presently the subject of six separate pending indictments in New Jersey and was recently convicted upon an indictment charging him with conspiracy to operate an illegal gambling organization and bribery of a public official.

It is clear from the very fact that appellant has hitherto refused to testify before the State Commission of Investigation that in procuring the foregoing indictments and in obtaining appellant's conviction on the first of those

indictments to be tried, the State has not required the use of appellant's compelled testimony in order to prosecute him.

Moreover, New Jersey, at the present time, is confident that it will be able to secure convictions against appellant on all of the presently pending indictments on the basis of evidence it now possesses. It is the State's belief, based upon extensive surveillance and confidential investigation that appellant is, or recently has been, a central force in organized crime in the State. By virtue of his position, appellant may be reasonably supposed to possess a great knowledge of the activities of organized crime in New Jersey.

As appellant indicates, the State freely acknowledges that Zicarelli is now and has been for some time a main or prime target for its investigation. If, however, the State and its investigatory agencies were to be bound to the so-called transactional immunity formula, the prosecution and society generally would be placed on the horns of a dilemma. If the State, through the appellee or a grand jury, sought to compel Zicarelli to testify pursuant to a transactional immunity standard, it presumably would be forced to abandon further efforts to prosecute him even though the evidence necessary to prosecute and convict him may have been independently obtained. While such compulsion of appellant's testimony might allow the State to gather sufficient evidence to prosecute various of Zicarelli's associates successfully, Zicarelli himself would likely emerge unscathed.

That the State in the present case would face a Hobson's Choice under a transactional standard is made clear by the equally distasteful alternative that would remain if it declined to immunize Zicarelli from prosecution. If appellant were allowed to remain silent, the State be-



believes that he could be convicted under the indictments now pending. However, from the knowledge of the history of organized crime it is feared that the organization itself would remain to some extent untouched.

The State regards both of the aforementioned alternatives available in this case under a transactional standard as unsatisfactory. Either result is at odds with traditional notions of the proper administration of justice, of fundamental fairness and of equal protection of the law.

If the State refused to allow appellant to escape prosecution and conviction, it would be relegated to attacking the hierarchy of organized crime on a "one-at-a-time" basis, thereby permitting a continual retrenchment in the ranks even as leading figures were brought to justice. At this juncture in history, the *amicus curiae* respectfully submits that law enforcement must be able to marshal more than the principle of deterrence to deal on even terms with the forces of organized crime. Law enforcement agencies must be able to wage their assault on all fronts and must be able to attack criminal organizations at all levels.

For this reason, the interest of society requires the ability to employ an immunity formula which, though it reliably assures one compelled to testify that he receives all of the protection he is entitled to under the Fifth Amendment, may likewise vindicate society's right to punish him for all crimes that can be proven without benefit of his own disclosures. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) and *Gardner v. Broderick*, 392 U.S. 273 (1968), offer cogent support for the belief, as developed in this brief, that an immunity formula which absolutely proscribes the use of compelled testimony or evidence derived therefrom is coextensive with the privilege against self-incrimination.

The interest of the *amicus curiae* and the other states that join in this brief in the present case is founded on that belief.

### Summary of Argument

It is the position of the State of New Jersey, *amicus curiae*, that N.J.S.A. 52:9M-17(b), which immunizes a witness from having his compelled testimony or the fruits therefrom used to expose him to criminal prosecution or penalty, provides a protection coextensive with that furnished by the Fifth Amendment privilege against self-incrimination.

The sufficiency of such an immunity formula has never before been placed in focus by cases heretofore decided on the merits by this Court. Previous cases have determined on the one hand that immunity formulas which only immunize the witness from the subsequent use of his compelled testimony, but fail to proscribe the use of such testimony to obtain investigatory leads or other sources of incriminating evidence, are constitutionally defective, *e.g.*, *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965).

On the other hand, this Court has repeatedly held that grants of immunity which provide for an absolute bar against the prosecution of a witness for any act arising out of a transaction about which he is compelled to testify do furnish at least as much protection as is afforded by the Fifth Amendment privilege. *Brown v. Walker*, 161 U.S. 591 (1896); *Ullmann v. United States*, 350 U.S. 422 (1956). However, such transactional immunity formulas have been rightfully criticized for affording the witness a protection which is "wastefully broader" than that granted by the privilege. *Murphy v. Waterfront Com-*

mission, 378 U.S. 52, 107 (1964) (Mr. Justice White concurring).

The formula embodied in N.J.S.A. 52:9M-17(b) differs from either of the approaches yet considered by this Court in that its contours are ineluctably determined by the parameters of the privilege.

Contrary to the appellant's further contention, the employment of the word "responsive" to characterize the type of answers sought and immunized against any direct or indirect use against the witness actually serves to eliminate ambiguity and vagueness from the statute. Indeed the use of the "responsiveness" criterion in conjunction with the word "answer" was inspired by this Court's opinion in *Hoffman v. United States*, 341 U.S. 479 (1951), which employed a similar concatenation.

Appellant raises a further point with regard to the applicability of the privilege against self-incrimination to the threat of foreign prosecution. The only authority on this question rejects the notion that the privilege furnishes protection against the use of compelled disclosure in foreign prosecution of the witness. Canada is the only foreign nation cited to which appellant might be extradited. Moreover it is the only country in which the fear of prosecution is not plainly fanciful. However, it is well established under both Canadian case law and Canadian federal statutes that the use of such compelled testimony would be barred in a subsequent Canadian prosecution.

From a practical standpoint the advantages to law enforcement of being able to employ an immunity formula of the type embodied in N.J.S.A. 52:9M-17 are manifold. The problem of guaranteeing that the immunity promised the witness by the statute is insured in fact may be adequately dealt under the exclusionary rules developed by

this Court. It has been recognized that such an approach is able to furnish one compelled to offer evidence or testimony the same protection he would have received had he been allowed to remain silent, while society's interest in "having the guilty brought to book" is also served. *United States v. Blue*, 384 U.S. 251 (1966).

## ARGUMENT

### POINT I

The testimonial immunity grant contained in N.J. S.A. 52:9M-17 is coextensive with the scope of the Fifth Amendment privilege against self-incrimination.

N.J.S.A. 52:9M-17(b) provides that a person complying with an order to answer a question posed by the State Commission of Investigation "shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate." It is the position of the State of New Jersey, *amicus curiae*, that the protection afforded by this statute is equivalent to that offered by the Fifth Amendment privilege against self-incrimination.

Appellant takes the position that he is constitutionally entitled to "transactional" immunity, i.e., complete protection against prosecution for the offense to which the compelled testimony relates. He further contends that the New Jersey statute violates the Fifth Amendment because it grants only a "testimonial" immunity, i.e., protection against the use of the compelled testimony and the fruits thereof. For this proposition, principal reli-



ance is placed upon the decision of this Court in *Counselman v. Hitchcock*, 142 U.S. 547 (1892). In response to that contention, the State respectfully urges that *Counselman* should not be read to require transactional immunity as a minimal constitutional standard and that to the extent it may require such standard, it should no longer be followed by this Court.

At issue in *Counselman* was a statute enacted by Congress in 1868 which provided as follows:

"No pleading of a party, nor any discovery or evidence obtained from a party of a witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. . . ." 15 Stat. 37 (1868)

Upon consideration of the statute, this Court held that while the witness was protected thereunder from the use of the evidence obtained against him, he potentially was exposed on the basis of other evidence to which his testimony might lead. It was clear to the Court that the Fifth Amendment would not be satisfied unless the witness were also shielded against the latter possibility:

"It follows that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence or used against him or his property in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his

property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." *Id.* 142 U. S. at 564.

After an extended review of a number of state and federal decisions and statutes, Mr. Justice Blatchford wrote what has become the principal ammunition of those who contend that *Counselman* requires transactional immunity:

"We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provisions, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." *Id.* 142 U.S. at 585-86.

It is noteworthy, however, that immediately following the last-quoted language, the opinion states:

"Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information that may supply other means of convicting the witness or party." *Id.* 142 U.S. at 586 (Emphasis supplied)

Congress was confronted with contradictory language in *Counselman* and reacted by passing a new statute which was designed to meet the broadest requirement discernible from that opinion. The statute provided that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction matter or thing" concerning which he may give or produce such evidence. 27 Stat. 443 (1893).

The constitutionality of this act was sustained in *Brown v. Walker*, 161 U.S. 591 (1896). The 1893 Act became a model for many "transactional immunity" statutes enacted by the federal government and the states.

If the *Counselman* case, *supra*, gave rise to intellectual uncertainty, the *Brown* case did not remove that uncertainty. *Brown* observes that the Fifth Amendment is susceptible of two interpretations. The first is a literal one and would bar the application of compulsion to force testimony from a witness. The second interpretation, and the one accepted by the Court, presupposes that the object of the Fifth Amendment is to secure a witness against a criminal prosecution which might be aided "directly or indirectly by his disclosure. . . ." *Id.* 161 U.S. at 595. The opinion pointed out that if no such prosecution were possible (in other words if the testimony operated as a complete pardon for the offense to which it related), then a statute absolutely securing such immunity to a witness would satisfy the demands of the Fifth

Amendment. That reasoning is relied upon by appellant in the present case and by some courts and legal commentators as supportive of the concept that the Constitution requires transactional immunity. See *e.g.*, the opinion of Judge Motley in *In re (Joannie) Kinoy*, — F. Supp. — (S.D.N.Y. 1971). Judge Motley further relies upon the subsequent decision of this Court in *Ullmann v. United States*, 350 U.S. 422 (1956), as providing reaffirmation of the concept. It should be pointed out, however that *Ullmann* did not consider whether a testimonial statute of the type presented by this case satisfies the Fifth Amendment privilege.

The dissent in *Brown* took the position that the absolute right to remain silent created by the Fifth Amendment was beyond the reach of Congress. The theory of the minority in *Brown* was that no immunity statute could supplant the right of an individual to be free from having to disclose facts involving disgrace or self-infamy. Such a concept appears to be unsupported by history. Dean Wigmore states the following with respect to the dissent in *Brown*:

“... [This] misconception employs the argument that a statutory immunity for a crime cannot annul the privilege against self-crimination because the disgrace at least remains. It thus rests upon the assumption that the present constitutional privilege has the function of protecting against the disclosure not only of criminality but also of disgrace. The notion exhibited in these passages ignores the independence in principle, in details and in history of the two privileges.” 8 WIGMORE, EVIDENCE §2255 (McNaughton rev. 1961).

It is not unreasonable to conclude that the main thrust of the majority opinion in *Brown* was to demonstrate



that the dissent was wrong in its concept of the scope of the Fifth Amendment. In rejecting the minority view, the majority may have inadvertently broadened the definition of constitutionally required immunity.

The question of "use" versus "transactional" immunity was never really in focus in *Brown*. The main issue there was whether any immunity statute could replace the privilege. In essence, the Court struck a bargain, amnesty for assistance. Nothing in that case and indeed nothing in the *Counselman* case, *supra*, holds that anything less than complete transactional immunity cannot match the contours of the privilege against self-incrimination. Indeed, in *Brown* there is language that may actually point to the opposite conclusion, to wit:

"Stringent as a general rule [against self-incrimination] is, however, certain classes of cases have always been treated as not falling within the reason of the rule, and therefore constituted apparent exceptions. When examined, these cases will all be found to be based upon the idea that, if the testimony sought cannot possibly be used as a basis for, or in aid of a criminal prosecution against a witness the rule ceases to apply . . ." *Id.* 161 U.S. at 597.

Further on in the majority opinion in *Brown*, the Court makes reference to another formula, different from that relied upon in upholding the statute, under which the compulsion of testimony might avoid self-incrimination:

"... we think that the witness cannot properly be said to give such evidence against himself unless evidence may in some proceeding be used against him, or, unless he may be subjected to a prosecution for the transaction concerning which he testifies." *Id.* 161 U.S. at 604. (Emphasis supplied).

The last-quoted language described two different situations, the first of which would obtain a grant of immunity of the type embodied in N.J.S.A. 52:9M-17 and the second of which is the type that obtains under a statute of a general character considered in *Brown*. Perhaps that portion of the *Brown* opinion foreshadowed the emergence of a new genre of immunity statute of which N.J.S.A. 52:9M-17 is representative. To the extent that *Brown* was a reaffirmation of the "absolute immunity" concept projected in *Counselman* it is urged that *Brown* too should no longer be followed since it appears to exact too heavy a price from society.

In the opinion of the Supreme Court of New Jersey affirming the constitutionality of the statute here under consideration, *In re Zicarelli*, 55 N.J. 249 (1970), it was pointed out that at the time *Counselman* was decided, the immunity question concerned only a federal statute and the restraint the Fifth Amendment imposed upon the federal government. In the words of Chief Justice Weintraub:

"Since then the Fifth Amendment has been found to apply to the States as well, and in addition the view has taken hold that evidence the federal government or a State obtains by forbidding compulsion may not be used by either jurisdiction. In that setting, the scope of the required immunity assumes new significance. If the immunity must protect against prosecution with respect to any offense, both state and federal, to which the testimony relates, the States would be unable to compel testimony no matter how urgent the public need since they could not immunize a witness from federal prosecution. And although the Congress can, in furtherance of federal investigations, bar state

prosecutions, still, the State's responsibility and interest in criminal matters being usually more pervasive and demanding, it might be too high a price to pay. See *Knapp v. Schweitzer*, 357 U.S. 371, 378-379, 78 S.Ct. 1302, 2 L.Ed. 2d 1393, 1400 (1958). In this new setting the more acceptable solvent is to protect the witness against the use of his compelled testimony by both jurisdictions but with each remaining free to prosecute on the basis of evidence independently obtained. *Id.* 55 N.J. at 267.

The New Jersey Supreme Court indicated that the problem was resolved in favor of permitting testimony to be compelled by both jurisdictions in the case of *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964). In that case, several persons had been held in contempt for refusing to answer questions posed as a result of an immunity grant under a New Jersey statute. The statute protected them from prosecution in New Jersey or New York but was silent with respect to any federal offenses. The individuals involved refused to answer on the ground that they might incriminate themselves under federal law. This Court held that the statute should be affirmed, but on the ground that the witness would indeed be protected in a federal prosecution by virtue of the Fifth Amendment.

After citing *Counselman* and quoting only those passages that criticized a prior federal statute for failing to protect against use of the fruits of testimony, this Court in *Murphy* held:

"... the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits

cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the State to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." *Id.* 378 U.S. at 79.

The concurring opinion of Mr. Justice White in *Murphy* lends credence to the view that this Court rejected the contention that the Fifth Amendment requires a grant of immunity from prosecution. Particular reference is directed to the following language:

"In reaching its result the Court does not accept the far-reaching and in my view wholly unnecessary constitutional principle that the privilege requires not only complete protection against any use of compelled testimony in any manner in other jurisdictions but also absolute immunity in these jurisdictions from any prosecution pertaining to any of the testimony given. The rule which the Court does not adopt finds only illusory support in a dictum of this Court and, and I shall show, affords no more protection against compelled incrimination than does the rule forbidding federal officials access to statements made in exchange for a grant of state immunity. But such a rule would invalidate the



immunity statutes of the 50 States since the States are without authority to confer immunity from federal prosecutions, and would thereby cut deeply and significantly into traditional and important areas of state authority and responsibility in our federal system. It would not only require widespread federal immunization from prosecution in federal investigatory proceedings of persons who violate state criminal laws, regardless of the wishes or needs of local law enforcement officials, but would also deny the States the power to obtain information necessary for state law enforcement and state legislation." *Id.* 378 U.S. 92-93.

While *Murphy* dealt with an inter-jurisdictional situation and did not on its face purport to affect whatever force *Counselman* continued to have in the intra-jurisdictional situation, the likelihood is that *Murphy* articulated a single standard equally applicable to either situation. If this were not true, then *Murphy* would have the result of establishing two co-existing standards: absolute immunity from prosecution in the context of a single jurisdictional situation and "use plus fruits immunity" as between two jurisdictions.

That result would be particularly anomalous in view of this Court's holding on the same day as *Murphy* (in the companion case of *Malloy v. Hogan*, 378 U.S. 1 (1964)) that the federal and state standards applicable to the Fifth Amendment's self-incrimination clause were the same.

The effect of *Murphy* is to reduce and virtually remove the force of the *Counselman* dictum with respect to absolute immunity and to offer compelling support for the

proposition that "use plus fruits immunity" is constitutionally adequate. See Duncan, *Federalism and the Fifth; Configuration of Grants of Immunity*, 12 U.C.L.A. L. Rev. 561 (1965).

In the case of *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), this Court found that the statute in question suffered from an infirmity more fundamental than that which infected the statute considered in *Counselman*, *supra*. The statute in *Albertson* met neither the "absolute immunity" test nor the "use plus fruits" standard.

The question of whether an immunity against compelled testimony and its fruits was sufficient was left unanswered in *Stevens v. Marks*, 383 U.S. 234 (1966). However, in *Gardner v. Broderick*, 392 U.S. 273 (1968), it was stated that "answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruit in connection with a criminal prosecution against the person testifying," citing both *Counselman* and *Murphy*.

In urging before this Court that the "use plus fruits" immunity concept contained in N.J.S.A. 52:9M-17 is coextensive with the scope of the Fifth Amendment privilege, the State of New Jersey, *amicus curiae*, is fully aware of the many statements that have been made by this Court respecting the importance of that privilege. Justice Frankfurter, *e.g.*, in *Watts v. Indiana*, 338 U.S. 49 (1949) stated:

"Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent . . . under our system society carries the burden of proving its charges against the

accused not out of his own mouth." *Id.* 338 U.S. at 54.

Mr. Justice Brennan, in *Malloy v. Hogan, supra*, 378 U.S. at 7, stated "... the American system of criminal prosecution is accusatorial, not inquisitorial, and ... the Fifth Amendment privilege is its essential mainstay."

The validity of the observations in the above statements is beyond question. Appellee, joined by the State of New Jersey, urges, however, that the statute here involved is consistent with that amendment. As Mr. Justice Brennan points out in his dissent in *Piccirillo v. New York*, 400 U.S. 548 (1971):

"The words of the Fifth Amendment do not, in terms, suggest that government may compel men to incriminate themselves provided it promises that it will not prosecute them for the crimes revealed. The clause does not prohibit a prosecution or conviction; it prohibits the application *vel non* of compulsion to an individual to force testimony which incriminates him, regardless of whether he is actually prosecuted. Historically, one of the major evils sought to be allayed by the development of the privilege was the use of torture to extract a confession not the subsequent use of the confession in a criminal trial." *Id.* 400 U.S. at 564 (dissenting opinion)

It is thus seen that prosecution is not barred by the Fifth Amendment. It is the aspect of compulsion or torture that lies at the heart of this clause. *Ibid.* In modern cases this has come to mean simply that a witness cannot be convicted out of his own mouth. At the time of *Counselman*, the concept of the "fruit of the poisonous tree" doctrine had not been developed. However, when this

Court decided *Murphy v. Waterfront Commission, supra*, the doctrine was in full force and provided a viable mechanism for policing the operation of immunity statutes and obviated the necessity for absolute immunity.

In his concurring opinion in *Murphy*, Mr. Justice White fully discusses this subject and points out that the privilege against self-incrimination protects against real dangers and not remote or speculative ones. Rejecting the argument that a defendant may not be able to establish that the evidence against him was based on his own testimony, Mr. Justice White states:

"... one might just as well argue that the Constitution requires absolute immunity from prosecution wherever the Government has obtained an inadmissible confession or other evidence through an illegal search and seizure, an illegal wiretap, illegal detention, and coercion. A coerced confession is as revealing of leads as testimony given in exchange for immunity and indeed is excluded in part because it is compelled incrimination in violation of the privilege. *Malloy v. Hogan*, 378 U.S., at 78, 84 S. Ct. at 1493-1494; *Spano v. New York*, 360 U.S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265; *Bram v. United States*, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568. In all these situations a defendant must establish that testimony or other evidence is a fruit of the unlawfully obtained evidence. *Nardone v. United States*, 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307; *Wilson v. United States*, 218 F. 2d 754 (C.A. 10th Cir.); *Lotto v. United States*, 157 F. 2d 623 (C.A. 8th Cir.), which proposition would seem *a fortiori* true where the Government has not engaged in illegal or unconstitutional conduct and where the inadmissible testimony is obtained by a government



other than the one bringing the prosecution and for a purpose unrelated to the prosecution." *Id.* 378 U.S. at 102-103 (concurring opinion).

The remedy for one who is able to show that he has testified in exchange for immunity is to compel the prosecution to demonstrate that its evidence is not tainted and that it derives from a wholly independent and proper source. *Id.* 378 U.S. at 79, fn. 18. But to bar any prosecution whatsoever would seem to extend a premium to the criminal that the framers of the Constitution never envisioned. It is urged that this Court affirm the constitutionality of N.J.S.A. 52:9M-17 and hold that testimony of a witness may be compelled so long as that witness is immunized from the use of that compelled testimony or anything derived therefrom.

## POINT II

The requirement that an answer be "responsive" to the question in order to obtain immunity under N.J.S.A. 52:9M-17 neither renders the statute unconstitutionally vague nor conditions the grant of immunity.

It is appellant's further contention that N.J.S.A. 52:9M-17 is rendered unconstitutionally vague by its employment of the adjective "responsive" in conjunction with the word "answer". Appellant reasons that in being compelled to offer an answer to a question posed by the Commission he is, in the first instance, left completely at the mercy of the questioning body as to whether his answer will be accepted as "responsive" and therefore immunized from later use. Further, appellant perceives as inhering in the scheme of the statute, the possibility that his answer may in the future be deemed "unresponsive" by a court ignor-

ant of the nature and intent of the Commission's inquiry and thus be admitted in evidence against him at such later time.

It is abundantly clear that the application of N.J.S.A. 52:9M-17 to appellant poses neither of these threats. In *In re Joanne Kinoy, supra*, the witness raised nearly identical objections to testifying on the basis of the due process guarantee. The witness's argument there was bottomed on the notion that the immunization of her testimony could only run to answers to questions deemed related to the subject matter of the order to testify. Thus, the witness argued that the proposed order placed her "in an untenable position of having to guess whether or not the question is related to the subject matter of the order." (Slip opinion, p. 4). The witness's purported dilemma there was expressed in virtually the same terms employed by the appellant here:

"If she thinks it is not related and refuses to answer, she may be held in contempt, if a court later determines it is related. If she thinks it is related to the subject matter of the order and answers the question she may have incriminated herself without the protection of immunity if a court later determines it is unrelated." *Ibid.*

Judge Motley, in remarks equally pertinent to the present case, illuminated the infirmity of the witness's argument:

"The court agrees that the order would be violative of due process if the above described consequences flowed directly from it. But the proposed order does not subject the witness to such perils. If the witness is not sure whether or not a question is related

to the subject matter of the order, he is entitled to a ruling from a court. Only after such a ruling and the witness's continued refusal to answer would the witness be subject for contempt. This procedure ensures the witness that he will know in advance the conduct that is proscribed and guarantees that he will not inadvertently waive his privilege." (Slip opinion at pp. 4-5).

A similar procedure is available to appellant. The Commission is unable unilaterally to compel appellant's testimony upon pain of contempt or to refuse to immunize compelled testimony. At the point of his refusal to testify, the Commission must pursue a contempt citation against the witness in order to compel his testimony. At this juncture, the witness can obtain from the court a delineation of what will constitute a "responsive answer" to the question.

Where a witness's answer has been accepted by the Commission as responsive, without objection, or is offered after guidance has been received from a court, the State is foreclosed from collaterally attacking the "responsiveness" of this answer in a later prosecution. Moreover, appellant misconceives the possible sanction where, upon answering immediately, his answer is deemed to have been "unresponsive". The sanction imposed in this case would be the same sanction imposed in the event the witness refused to answer the question.

Both of these conclusions are clear from current practice and the design of the statute. In the contemplation of a provision which seeks to uncover truth, an unresponsive answer is tantamount to a *pro tanto* refusal to produce relevant evidence. Cf. *Glickstein v. United States*, 222 U.S. 139 (1911); *United States v. Shotwell Mftrg. Co.*, 355 U.S.

33 (1957); *Travellers' Fire Insurance Co. v. Wright*, 322 P. 2d 417, 423 (Okla. Sup. Ct. 1958); *Annot. Incriminatory Disclosures—Immunity*, 53 A.L.R. 2d 51 (1956); *Ferrantello v. State*, 158 Tex. Crim. 471, 256 S.W. 2d 587 (Tex. Ct. Crim. App. 1952).

It is well established that immunity legislation requires the sanction of contempt process to force all relevant evidence out of unwilling witnesses. *United States v. Bryan*, 339 U.S. 323, 353 *et seq.*, rehearing denied, 339 U.S. 991 (1950). N.J.S.A. 52:9M-17 fulfills this requirement by employing the contempt power both in the situation where the failure of the witness to comply with the order to answer takes the form of a refusal to answer (the instant case), and the situation where the lack of compliance results from the answer's "unresponsiveness". The only sanction available under the statute to deal with such unresponsiveness is prosecution of the witness for contempt. The witness may be held in contempt for failure to give "an answer . . . in accordance with the order of the commission"; however, "such answer" is not to be used:

" . . . to expose him to criminal prosecution . . . [but] any *such answer given or evidence produced* shall be admissible against him . . . upon any investigation, proceeding or trial against him for such contempt." N.J.S.A. 52:9M-17 (b). (Emphasis supplied).

Where a witness refuses to testify there can be no "such answer given or evidence produced" to be admitted as evidence in a contempt proceeding. See *United States v. Bryan*, *supra* at 339-340. Clearly, the provision for introduction of "such answers" in a contempt proceeding refers to "unresponsive answers" and therefore provides that "such answers" may only be admitted in evidence against



the defendant in such a contempt proceeding. Hence, there is no threat under N.J.S.A. 52:9M-17 that appellant's testimony could later be used against him upon a finding by a court at that time that such testimony was not "responsive". Unless the Commission objects to an answer on the grounds that it is not "responsive", which objection may go either to its incompleteness or its gratuitous and irrelevant character, requiring the answer be stricken, and seeks to compel a "responsive answer" through a contempt order, use of such answer is absolutely barred.

However, it is the contention of the *amicus curiae* that these questions are largely academic. The concept of "responsiveness" as applied to the witness's obligation to testify is in no way elusive. The appellant's claim that the employment of the word "responsive" fatally obfuscates the requirement to answer imposed by the statute is belied by the long history of the use of this term by both courts and legal scholars in discussing the law of evidence.

The employment of the word "responsive" in conjunction with the obligation of a witness in giving answers extends at least to the time of Jeremy Bentham. Bentham characterized "responsive" testimony as the first of the principal means of producing "accuracy and completeness" in the answers of a witness. BENTHAM, JUDICIAL EVIDENCE, 52-54 (London, 1825).

The meaning of the word "responsive" in association with the word "answer" has remained unchanged to this day as the indicator of an answer's accuracy and completeness. *Henderson v. State*, 208 Ga. 73, 75, 65 S.E. 2d 175, 177 (Sup. Ct. Ga. 1951); SUTHERLAND, STATUTORY CONSTRUCTION, §5303 at 9 (1943).

Indeed, the inclusion of the word "responsive" in this particular statute appears to have been inspired by this

Court's employment of the term to qualify the word "answer" in the context of an immunity statute. In determining at what point a witness must be afforded immunity to compel his testimony after an invocation of the privilege against self-incrimination, this Court has held that immunity must be granted where it appears "... that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosures could result." *Hoffman v. United States*, 341 U.S. 479, 487 (1950).

In thus stating the rule, the Court employed terminology favored by Dean Wigmore who states, "where the question is in the tenor not improper, but is answered with inadmissible matter not responsive to the question, objection made upon the answer is reasonable; its form here is a motion to strike out the answer." 1 WIGMORE, EVIDENCE § 18 at 324 (3rd ed. 1940). See also 3 WIGMORE, *op. cit. supra* § 785; 5 WIGMORE, *supra* § 1392.

The New Jersey Legislature, in drafting N.J.S.A. 52:9M-17, was not alone in concluding the term was not too abstruse for inclusion in an immunity statute. Research reveals that the word "responsive" is also used in the basic New York immunity statute to describe answers required under that provision:

"A witness who gives evidence in a grand jury proceeding receives immunity unless:

(a) . . . .

(b) such evidence is not responsive to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive." N.Y. CRIM. PROC. LAW §190.40-2, (Emphasis supplied).

From the Court's use of the word "responsive" in *Hoffman, supra*, as well as its employment in the New York statute, it is plain that "responsive" is not an arcane word. Rather than being a word fraught with uncertainty its meaning is easily comprehended. It is:

"... [the property of] Answering, constituting or comprising a complete answer. A 'responsive' allegation is one which directly answers the allegation it is intended to meet . . ." BLACK, LAW DICTIONARY 147 (4th ed. 1951).

"Responsive" has also been defined as: "that (which) responds; answering, replying. (*Webster's New International Dictionary*, (2nd ed.) p. 2124)'" *Savings Finance Corp. v. Blair*, 280 S.W. 2d 675, 677 (Mo. Ct. App. 1955).

In drafting N.J.S.A. 52:9M-17, the Legislature sought to insure that only a reply which actually was intended to "answer" the inquiry would be immunized. The clear intent was to avoid sham answers and unsolicited admissions designed to confer "immunity baths" of the type proscribed by the New York immunity statute, cited above, just as surely as the provision was designed to avoid perjury or complete failures to answer. *United States v. Bryan, supra*, 339 U.S. at 338-339.

Employment of the word "responsive" implements this intention more clearly than if the word "answer" had appeared alone in the provision. From appellant's point of view, it might just as well be argued that the word "answer" is itself too vague a term to satisfy due process, for in fact a "responsive answer" means no more than a good faith answer, that is, a *bona fide* attempt to present to the best of the witness's ability that information sought by the inquiry. See *In re Zicarelli, supra*, 55 N.J. at 270-271.

Even if the threat of subsequent use to incriminate the witness did exist as a result of the "responsive" requirement, it is well established that this Court could simply take a prophylactic approach to the statute and determine the use of the word "responsive" to be redundant, thus eliminating the alleged vagueness. *Lynch v. Overholser*, 369 U.S. 705, 710-711 (1962).

Appellant's contention that the grant of immunity is somehow defective in that it is conditional is without substance. The only "condition" placed upon the grant of immunity is a cognate of the condition of truthfulness itself, by which the witness has sworn to abide. Clearly the use of the word "truthfully" does not result in a conditional immunity. *Ferrantello v. State, supra*, 256 S.W.2d at 595. Annot. 53 A.L.R. 2d 1030, 1052 (1956); Annot. 118 A.L.R. 602, 627 (1939). In the context of an immunity provision the word "responsive" is nothing more than a restatement of the oath's requirement that the witness tell the "whole truth, nothing but the truth." An evasive, incomplete, irrelevant or misleading answer does not tell the "whole truth" and is not offered in good faith to meet that purpose.



## POINT III

The threat of foreign prosecution is not relevant to the privilege against self-incrimination nor can appellant demonstrate a genuine fear that his compelled testimony might be used to incriminate him in a foreign prosecution.

A) Appellant fails to demonstrate real and substantial fear of prosecution by either Venezuela or the Dominican Republic.

It is appellant's contention that in addition to the threat of prosecution in this country, he currently faces a "real and substantial fear of foreign prosecution" in three other countries. Cf. *Murphy v. Waterfront Commission, supra*, 378 U.S. at 67-68. These other countries are the Dominican Republic, Venezuela and Canada.

Apart from referring to an article which indicates that appellant "has holdings in Venezuela" (App's Br. p. 38) which in itself is innocuous, appellant offers nothing to substantiate his claim that he is threatened with prosecution in Venezuela. Moreover, appellant acknowledges that he could not be extradited to Venezuela even if an actual prosecution in that country was imminent.

The allegations connecting appellant with former Dominican Republic President Trujillo, although they intimate that appellant may have engaged in foul play at the behest of Trujillo, go no further than to allege his complicity in violating the laws of the State of New York and the United States, the locus of the alleged acts. It is hard to fathom on what basis appellant would have this Court determine that there is a real possibility of him being prosecuted and punished by the Dominican Republic for his alleged involvement in acts which took

place fifteen or twenty years ago in New York, even if the victims of such alleged crimes were Dominican citizens.

Again, the fact that appellant admits there is no treaty under which he might be extradited to the Dominican Republic for such crimes would appear to dispose of his contention with regard to that country. On the basis of appellant's own recitals it is respectfully submitted that the prosecution of the appellant by the Dominican Republic:

"... is not a real and probable danger with reference to the ordinary operations of the law in the ordinary courts, but 'a danger of an imaginary and unsubstantial character having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct' ". *Brown v. Walker, supra*, 161 U.S. at 608.

**B) There is no threat that Canada would use disclosures compelled from appellant in a subsequent prosecution in Canada.**

Of the three countries mentioned appellant concedes that Canada is the only one to which he could be extradited. (App's Br. p. 43). Appellant contends that he could be prosecuted for alleged violations of the Canadian Food and Drug Regulations in which he had been implicated. For argument's sake it may be assumed that appellant faces a "real and appreciable danger of prosecution on these charges."

Given the foregoing premise, two principal questions are raised: (1) May appellant be compelled to testify under grant of immunity, if such immunity does not purport to protect him against the possible use of his com-

pelled testimony in a foreign prosecution? (2) Would a Canadian court permit such compelled testimony to be used against appellant in a subsequent Canadian prosecution?

The result in *Murphy v. Waterfront Commission, supra*, is clearly bottomed on the proposition that a state clearly can compel testimony though by itself it lacks the power, and cannot even purport to protect the witness through its own devices, against the use of his compelled testimony by the second sovereign, *i.e.*, the federal government.

*In re Parker*, 411 F. 2d 1067 (10 Cir. 1969) *cert. granted*, judgment vacated as moot, *sub nom Parker v. United States*, 397 U.S. 96 (1970) deals with the application of this principle to the same state of facts which underlies the first question. In *Parker*, the appellant argued that although she had been "granted immunity from both federal and state prosecution and accordingly adequately protected against her danger of self-incrimination in all courts within the United States . . .", *id.* at 1069, she could properly refuse to testify on the grounds that "certain of the questions propounded to her, if answered, would furnish a link in the chain of evidence needed to prosecute her for an extraditable Canadian crime." *Ibid.* Appellant makes nearly the identical contention.

Before dealing directly with this issue the Tenth Circuit observed that Rule 6 (e) of the Federal Rules of Criminal Procedure would prevent disclosure of matters brought before the grand jury unless otherwise ordered by a federal court; thus, the likelihood of such testimony ever being made available to a Canadian prosecutor was by itself infinitesimal. *Id.* at 1069-1070. It should be noted that the Commission's proceeding in which appellant was called to testify was *in camera* and provisions similar

to Rule 6 (e) govern the conduct of its investigations. Under N.J.S.A. 52:9M-15 and 16, it is likewise highly improbable that any information elicited from appellant could reach Canadian authorities.

The court in *Parker* however, because of the nature of the District Court's decision, squarely met the question of the relevancy of possible foreign prosecution to the protection of the privilege. In affirming the District Court's holding "that the Fifth Amendment provides no shelter for appellant against incrimination in a foreign jurisdiction", *id.* at 1070, the court went on to dispose of the argument that *Murphy v. Waterfront Commission, supra*, pointed to any different result:

"It is true that Mr. Justice Goldberg, writing for the majority in *Murphy, supra*, traced the history and importance of the privilege against self-incrimination and in so doing indicated approval of some early English cases where the privilege was thought applicable to a 'foreign jurisdiction' or 'country'. But the Justice's reference to such cases was simply by way of argumentative analogy to this nation's state-federal relationship and carries no further persuasion. The Fifth Amendment was intended to protect against self-incrimination for crimes committed against the United States and the several states, but need not and should not be interpreted as applying to acts made criminal by the law of the foreign nation." *Ibid.*

Although the question was not reached in *Parker*, it is well established that the Canadian courts would bar a Canadian prosecutor from making any use of incriminating testimony obtained through compulsion in this country. As demonstrated below, appellant would have the



same protection from the use of his compelled disclosures by a Canadian prosecutor as he would have against the use of such evidence in a subsequent prosecution brought by another state or the federal government, by virtue of the rule of *Murphy v. Waterfront Commission, supra*.

Canada, along with the United States, inherited the privilege against self-incrimination from the English common law. Canada has always honored that privilege without deference to the "dual sovereignty" doctrine which limited its efficacy in this country before *Murphy*.

More than forty years prior to the *Murphy* decision, the Supreme Court of Canada in *Prosko v. Rex*, 62 S.C.R. 226 (Sup. Ct. Canada 1922), rejected the notion that the dual sovereignty doctrine had any relevance where both sovereigns adhered to the privilege against self-incrimination. Grant, *Federalism and Self-Incrimination: Common Law and British Empire Comparisons*, 5 U.C.L.A. L. Rev. 1, 10 (1958).

In *Prosko*, the Canadian Court articulated the principle that the use of compelled evidence is barred under a single standard. This principle appears to have remained unchallenged from that time. In that case, defendant, after having been involved in a murder in Quebec, escaped over the border to Detroit whereupon he was arrested by United States Immigration officials with the connivance of the Canadian authorities. Upon being told that the Immigration Board was considering his deportation to Canada, he revealed his complicity in the Canadian murder to the American officials in an effort to avoid deportation. He repeated the same story before the United States Immigration Board and was thereupon deported to Canada.

A trial for murder ensued in Canada during which American immigration officials appeared at the trial and

repeated the confessions Prosko had made to them and to the Immigration Board. Prosko was convicted of murder and appealed to the Supreme Court of Canada.

Chief Justice Davis for the court found that irrespective of the place where the statements were made, their admission before a Canadian court was to be governed by:

"... [what] has long been established as a positive rule of English criminal law, that no statement of an accused is admissible in evidence against him unless it is shewn [sic] by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage exercised or held out by the person in authority. The principle is as old as Lord Hale." *Id.*, 63 S.C.R. at 229-230. See also, re admissibility *Piche v. Regina*, 74 W.W.R. 674, 11 D.L.R. 3d 700 (Sup. Ct. Can. 1970); Grant, *Federalism and Self-Incrimination*, *supra* at 10-11.

In 1952, the Federal Parliament of Canada enacted the *Canada Evidence Act*, R.S.C. (1952), c. 307. Section 5 of this act in effect abrogates the common law privilege against self-incrimination and replaces it with a broad "use" immunity provision, to wit:

§5 "(1). No witness shall be excused from answering any question upon the grounds that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

(2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance

of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then, although the witness is by reason of this Act, or by reason of such provincial Act compelled to answer, the answer so given shall not be used or receivable in evidence against him thereafter, taking place other than prosecution for perjury in the giving of such evidence."

By its own terms, this provision protects the appellant from the use of his testimony in a Canadian prosecution where, as here, he objects to answering such question on the grounds that his answer may "tend" to incriminate him under Canadian Law, that is, furnish a "link in the chain" of evidence required to establish his guilt under the Canadian Food and Drug Regulations. Thus, it is apparent that vis a vis a Canadian Federal prosecution, appellant would enjoy the same protection he is afforded under *Murphy v. Waterfront Commission, supra*, with respect to a subsequent federal prosecution following his compelled testimony in New Jersey.

Hence, even if the threat of a prosecution in a foreign country were within the scope of the protection afforded by the Fifth Amendment, it is clear that appellant does not face any real threat that evidence he is compelled to give before the State Commission of Investigation may be used against him in a foreign prosecution. Canada, the only foreign jurisdiction where such threat is even colorable would not permit the introduction of testimony obtained through compulsion in a Canadian federal prosecution.

## POINT IV

**The availability of a use immunity statute is of significance to the effective administration of criminal justice.**

The statute at issue in this case controls the workings of an investigatory agency of the State of New Jersey. That agency plays an integral role in the team concept of law enforcement that has developed in New Jersey and elsewhere in direct response to the sophisticated methods that are now being regularly employed by criminal elements throughout the United States.

In order to meet this challenge, the State has developed a number of innovative weapons such as state-wide grand juries, full-time prosecutors, availability of electronic surveillance under controlled conditions, as well as witness immunity acts.

New Jersey is not alone in promulgating a statute that compels testimony in exchange for immunity from the use of that testimony or its fruits. The Congress included a similar provision in the Organized Crime Act of 1970, 18 U.S.C. §§6001-6003.

In his concurring opinion in *Murphy v. Waterfront Commission, supra*, Mr. Justice White points out:

"... the States still bear the primary responsibility in this country for the administration of the criminal law; most crimes, particularly those for which immunity acts have been proved most useful and necessary, are matters of local concern; federal pre-emption of areas of crime control traditionally reserved to the States has been relatively unknown and this area has been said to be at the core of the con-



tinuing viability of the States in our federal system." *Id.* 378 at 96.

The experience that appellee has had with the appellant in the present case illustrates how difficult it is to get at the roots of organized crime and to uncover information that will be useful in carrying out the mandate of the States to enforce the criminal law.

In testimony before a Congressional subcommittee, Professor Robert Dickson, a consultant to the National Commission on Reform of Federal Criminal Law, pointed out that an immunity statute of the sort here presented may have only corollary utility in certain kinds of conventional criminal investigation (as for example where there is a potentially cooperative witness), but that its great value lies in overcoming the resistance of the witness who does not intend to cooperate at all, regardless of the inducement. *Hearings on H.R. 11157 and H.R. 12041 before Subcomm. No. 3 of the Comm. on the Judiciary House of Representatives, 91st Cong., 2d Sess.* Admittedly, not even an immunity statute will necessarily compel testimony, but it is surely helpful in many situations.

The experience in New Jersey under this statute and under a related statute which is applicable to grand jury and court proceedings (N.J.S. 2A:81-1.3) is still rather limited. However, the present case suggests that the use immunity statute is making its mark. The State, therefore, welcomes this opportunity to present the legal issues to this Court and to have a definitive ruling in this most important area.

In supporting the appellee in this case, the State of New Jersey, as *amicus curiae*, respectfully urges that the best reason for affirming the validity of a use im-

munity statute is that there is nothing suggested by the Fifth Amendment to compel any greater tender to a witness. It has been pointed out that *Counselman* and its progeny developed in a different era before the exclusionary rules and before many of the problems presented by modern day crime had even been imagined.

If a man is compelled to testify but guaranteed that that testimony and the fruits of that testimony can never be used against him, it strains the concept of reasonableness to understand why he must be provided, in addition to that guarantee, an absolute assurance that he will not be prosecuted. If the government is successful in obtaining evidence independently, it should be permitted to proceed with that evidence. While its burden may be great the question of whether it has carried that burden is factual and can be left to the wisdom of the courts and the juries that will ultimately consider it. Parenthetically, it has been suggested by the appellee that under a transactional immunity statute, there may actually be greater problems of proof that befall a witness than under a use immunity statute.

In the case of *United States v. Blue*, 384 U.S. 251 (1966), Mr. Justice Harlan writing for this Court pointed out that if the government acquires evidence in violation of the Fifth Amendment, the remedy is to suppress that evidence and its fruits at trial, not to dismiss the indictment. He said:

"So drastic a step [barring prosecution altogether] might advance marginally some of the ends served by the exclusionary rules, but it would also increase to an intolerable degree interference with a public interest in having the guilty brought to book." *Id.* 384 U.S. at 255.

The reasoning in the *Blue* case has great pertinence here. It is similarly urged that to refrain from any prosecution as the price for information of criminality would be an intolerable interference with the public interest in having the guilty brought to justice. It is urged therefore that this Court put an end to the challenges to the concept of "use plus fruits" immunity and free the states to continue forthwith with their efforts to combat criminality through resort to statutes embodying that concept.

### CONCLUSION

For the reasons expressed herein it is respectfully urged that N.J.S.A. 52:9M-17 be declared constitutional under the Fifth and Fourteenth Amendments of the United States Constitution and that the judgment of the Court below be affirmed.

Respectfully submitted,

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**IN THE**  
**Supreme Court of the United States**

**OCTOBER TERM, 1971**

\_\_\_\_\_  
**No. 69-4**  
\_\_\_\_\_

**JOSEPH ARTHUR ZICARELLI, Appellant,**

**v.**

**NEW JERSEY STATE COMMISSION OF INVESTIGATION,**  
**Appellee.**

\_\_\_\_\_  
**On Appeal from the Supreme Court of the**  
**State of New Jersey**  
\_\_\_\_\_

**BRIEF FOR THE NATIONAL DISTRICT ATTORNEYS**  
**ASSOCIATION AND AMERICANS FOR EFFECTIVE**  
**LAW ENFORCEMENT, INC., AS AMICI CURIAE IN**  
**SUPPORT OF POSITION OF APPELLEE**  
\_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1971

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No. 69-4

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JOSEPH ARTHUR ZICARELLI, *Appellant*,

v.

NEW JERSEY STATE COMMISSION OF INVESTIGATION,  
*Appellee.*

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On Appeal from the Supreme Court of the  
State of New Jersey

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BRIEF FOR THE NATIONAL DISTRICT ATTORNEYS  
ASSOCIATION AND AMERICANS FOR EFFECTIVE  
LAW ENFORCEMENT, INC., AS AMICI CURIAE IN  
SUPPORT OF POSITION OF APPELLEE

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This brief is filed with the written consent of the parties, pursuant to Rule 42.2, Revised Rules of the Supreme Court of the United States. It supports the Appellee's position and the ruling below of the Su-

preme Court of New Jersey in *In Re Zicarelli*, 55 N.J. 249, 261 A. 2d 129 (1970), on the central issue of the required scope of witness immunity. That position is that "use restriction" immunity, as distinguished from "absolute" or "transactional" immunity, is a constitutional means to compel testimony after a claim of the privilege against compulsory self-incrimination.

### INTEREST OF AMICI CURIAE

A. The National District Attorneys Association is a nonprofit, nonpolitical, tax-exempt corporation composed of approximately 4,000 members representing all 50 States. The purposes of the National District Attorneys Association are, *inter alia*, to improve and to facilitate the administration of justice in the United States and to promote the study of law and legal institutions.

To effectuate these aims the National District Attorneys Association for many years has utilized an Amicus Curiae Committee to file briefs in cases of national importance in the United States Supreme Court. We seek to make known the views of all prosecutors in America and to bring before this Court their position on matters affecting the discharge of the duties of prosecutor.

Crime in America has grown to include an extremely mobile and scientifically-equipped organization. To meet the coordinated power of this insidious segment of our society, which seeks by unlawful means to exploit its fellow citizen, the prosecutors of America must avail themselves of every available law enforcement technique, including the immunity statute technique, and utilize the advantages of cooperation and coordination open to them.

Over the past five years, this Association has sought and received this Court's permission to file Amicus Curiae briefs in criminal cases, with pervasive national significance.

The present issue is equally important—the “immunity bath” of absolute immunity versus the exclusionary rule of use restriction. This issue poses a conflict between two important legal principles—the fair trial right of compulsory process for both parties, and the privilege against compulsory self-incrimination. We feel that a rule requiring full use restriction, and only such a rule, will protect both of these legal principles.

The benefit to law enforcement—state, federal, and local—which would accrue from use immunity is of major importance. The criminal of today, especially the organized crime violator, is often engaged in many forms of undercover illicit activity, based on a web of interlocking agreements. Because there is little “hard” evidence, interrogation techniques are essential. If the plea of self-incrimination can only be countered with an absolute immunity statute, a gratuity to crime will accompany each immunity grant. All prosecutions in any jurisdiction which are related to the testimony will be barred, even if independent, untainted evidence exists. Governments may well hesitate to pay this high price for yet-to-be-acquired evidence of uncertain value, thus effectively blocking many important, even vital, investigations. Full use restriction immunity gives full protection to the witness without raising the hazards of an immunity bath. The familiar exclusionary rule should be the standard, not the concept of absolute immunity.

It is this interest, we respectfully submit, which compels us to seek the Court's indulgence in filing the instant brief.

B. Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit, nonpartisan, nonpolitical organization incorporated under the laws of the State of Illinois. AELE has received a tax exempt ruling from the Internal Revenue Service as an educational corporation. As stated in its bylaws the purposes of AELE are: (1) To explore and consider the needs and requirements for the effective enforcement of the criminal law; (2) To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens; (3) To assist the police, the prosecution and the courts in promoting a more effective and fairer administration of the criminal laws.

AELE has appeared in this Court as Amicus Curiae in the cases of *Terry v. Ohio*, 392 U.S. 1 (1968); *Hill v. California*, 91 S.Ct. 1106 (1971), and *United States v. Roosevelt Hudson Harris*, 39 U.S.L.W. 4835 (U.S. June 28, 1971).

The interest of AELE is in representing the concern of the average citizen with the problems of crime and with police effectiveness. We seek to articulate this concern to the Court in order that the rights of the law abiding citizens of this country to be reasonably free from criminal harm may receive due consideration.

The instant case is, we believe, one of vital significance to law enforcement and to the law abiding citizen. Its importance to the citizens of this country becomes



obvious when we consider the pervasive nature of the influence of organized crime on the daily lives of all of us—rich and poor, black and white. The problem has been eloquently phrased in the recent report of a federal crime commission:

In many ways organized crime is the most sinister kind of crime in America. The men who control it have become rich and powerful by encouraging the needy to gamble, by luring the troubled to destroy themselves with drugs, by extorting the profits of honest and hardworking businessmen, by collecting usury from those in financial plight, by maiming or murdering those who oppose them, by bribing those who are sworn to destroy them. Organized crime is not merely a few preying upon a few. In a very real sense it is dedicated to subverting not only American institutions, but the very decency and integrity that are the most cherished attributes of a free society.<sup>1</sup>

Grants of immunity in criminal cases have been primarily aimed at undermining the structure of organized crime, or of business crime (e.g., antitrust). The use restriction of immunized testimony, contended for herein, will make an immunity grant one of the most potent weapons available to the government against group crime. It will permit the maximum effective use of the immunity concept without creating an "immunity bath," and also will fully protect the witness against self-incriminating use of his disclosure.

For these reasons AELE respectfully submits that it has a valid interest in the instant case.

<sup>1</sup> President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 209 (1967).

### QUESTION PRESENTED

Although the parties present several issues, the amici curiae address themselves only to the following constitutional question which is basic to the instant case and to others:<sup>2</sup>

Consistent with the Fifth and Fourteenth Amendments, can a witness' claim of the privilege against compulsory self-incrimination be overcome by an immunity statute which bars use of the compelled testimony and any derivative fruits, but does not grant absolute immunity against prosecution for all offenses related to the compelled testimony?

### SUMMARY OF ARGUMENT

Since 1896 it has been an established principle of American constitutional law that a witness' claim of the privilege against compulsory self-incrimination may be overcome by an immunity statute, and testimony may be compelled, because the Fifth Amendment is concerned only with self-incrimination, not self-infamy. *Brown v. Walker*, 161 U.S. 591 (1896). The only matter in dispute is the scope of the immunity which must be offered in order to remove the element of incrimination and thus provide a constitutionally adequate substitute for the right of silence which otherwise attends a proper claim of the Fifth Amendment.

As a matter of logic, and actual practice in the English speaking world, it is possible to distinguish three types of immunity: (1) prohibition of direct use of the testimony (limited use immunity); (2) prohibition

<sup>2</sup> See, e.g., *Stewart v. United States*, *Kastigar v. United States*, 440 F. 2d 954 (9th Cir. 1971), cert. granted, 39 U.S.L.W. 3511 (May 17, 1971).

of direct use of the testimony and any derivative fruits (full use immunity); (3) prohibition of prosecution for any transaction related to the compelled testimony (absolute or "transactional" immunity).

The first type, limited use immunity, was quite common in federal and state practice in this country during most of the nineteenth century, and is still the primary reliance in Canada and in England. However, as it came to be perceived that the compelled witness could still suffer a species of self-incrimination by furnishing clues to non-immunized evidence, doubts arose concerning the constitutional adequacy of such a statute. A federal limited use restriction statute, R.S. 860, was nullified in *Counselman v. Hitchcock*, 142 U.S. 547 (1892), on the ground that it was not an adequate substitute for the Fifth Amendment.

The *Counselman* opinion did not discuss the constitutionality of a statute of the second type, full use restriction immunity, the issue not being present in the case. But it may be inferred from the Court's extensive discussion of federal and state precedents that such a statute would be constitutional. The present appeal brings to the Court for the first time the constitutionality of full use restriction immunity. The *Counselman* opinion did note that a statute of the third type, absolute immunity, would of course be constitutional. However, that statement is at best dictum if read as an exclusive requirement, and is better read as a rhetorical statement in keeping with the imprecision both about the Fifth Amendment privilege and about immunity statutes found in all courts in this period.

Faced, however, with this ambiguity in the *Counselman* opinion, Congress chose to play it safe, and its next immunity enactment—in support of investigations under the Interstate Commerce Act—took the form of an absolute immunity statute. It was sustained in *Brown v. Walker, supra*, and became the model for immunity legislation, federal and state, for 75 years. More realistic perceptions developed in the decade of the 1960's, however, in response to several opinions of this Court beginning with *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), and legislatures began to adopt the middle position of full use restriction immunity, *e.g.*, the New Jersey statute at issue in the instant appeal, and the new federal witness immunity act of 1970, 18 U.S.C. §§ 6001-6005 (1970).

An absolute immunity statute is an "immunity bath" statute. It grants blanket amnesty, or pardon, for any offense related to the witness' testimony. If the offense is "related" to the testimony, prosecution is barred even if the government has sufficient independent, untainted evidence to obtain a conviction. The concept offends not only logic but history. A careful study of the sources reveals that there is nothing in the English origins, early history, constitutional adoption, or nineteenth century perceptions of the privilege against compulsory self-incrimination which supports the proposition that a witness immunity statute can serve the purposes of the privilege only by operating as a total pardon for any offense related to the compelled testimony.

The essential purpose of the Fifth Amendment today is to ensure that an offender shall not be forced to help convict himself. The problem of religious and



political dissent with which the privilege was associated in its seventeenth century origins is now covered by the First Amendment, and a whole cluster of clauses in the Bill of Rights safeguard the core of the "accusatorial" method of law enforcement, as distinct from the inquisitorial method.

The absolute immunity concept, by exacting too high a price from the government and offering in effect a gratuity to crime, discourages governmental use of the immunity device as a law enforcement tool. This effect was not critical so long as the crime problem centered on individual crime. Today however, with the substantial increase in regulatory offenses and group crime, including white collar offenses such as consumer fraud and the pestilence of "organized crime," this effect is most detrimental to law enforcement and the protection of the public. In group crime there is little hard evidence, only a web of illegal understandings, and interrogation is essential as a law enforcement tactic.

In all other areas of evidence-related constitutional principles, our reliance is on the exclusionary rule, which is the analog of full use restriction in immunity statutes. For example, *Miranda v. Arizona*, 384 U.S. 436 (1966), and a long line of search and seizure and electronic eavesdropping cases rest on the exclusionary rule, not on a blanket pardon concept. It would be anomalous to try to maintain the position that the exclusionary rule is good enough for safeguarding against harm flowing from police violations of constitutional principles in investigations of street crime and the offenses especially related to the poor, but also to argue that the crime of the middle classes—white

collar business crime, and organized crime—require blanket pardon before the immunity technique can be invoked.

A full use restriction concept can be placed under as heavy a governmental burden of proof of the “independence” of evidence used after an immunity grant as the Court deems needful to preserve the constitutional privilege—even more stringent than obtains in search and seizure situations. *Miranda v. Arizona, supra*, itself rests on something akin to a burden of proof concept related to Fifth Amendment interests. Full use restriction statutes also avoid the problem associated with absolute immunity statutes of proving the relationship of the testimony to the future prosecution, with the burden allocated to the defendant. Further, full use restriction better preserves equal treatment values among offenders than does an absolute immunity statute because the one immunized obtains a complete pardon, while the other may go to jail.

Although much has been made of the supposedly greater difficulty, inside a given law enforcement jurisdiction, of policing full use restriction immunity than of policing absolute immunity, no empirical proof has been advanced. Our traditional exclusionary rules for confessions and search and seizure have operated as effectively in intrajurisdictional context as in interjurisdictional context.

Looking to the future, a full use restriction immunity formula could be an appropriate way to extend the immunity technique on behalf of defendants, thus implementing their Sixth Amendment right to compulsory process even in regard to Fifth-Amendment-pleading defense witnesses. By contrast, it would be un-

thinkable to empower defense counsel to confer absolute immunity in such situations.

In short, a full use restriction immunity formula is constitutionally adequate to compel testimony under the Fifth Amendment, is in accord with traditional exclusionary rules, and avoids the immunity bath problem and other problems associated with the atypical concept of absolute immunity.

### ARGUMENT

**I. NOTHING IN THE ORIGIN, EARLY HISTORY, AND PURPOSES OF THE PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION, NOW EMBODIED IN THE FIFTH AMENDMENT AND MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT, SUPPORTS THE PROPOSITION THAT A WITNESS IMMUNITY STATUTE CAN SERVE THE PURPOSES OF THE PRIVILEGE ONLY BY OPERATING AS A TOTAL PARDON FOR ANY OFFENSE CONNECTED IN ANY WAY WITH THE COMPELLED TESTIMONY.**

#### **A. Seventeenth Century English Origins**

The privilege against compulsory self-incrimination is at once the most romanticized and also the most complex and misunderstood of the guarantees embedded in the Bill of Rights. Its recognition in English jurisprudence is generally traced to the seventeenth century, a time of major political and religious upheaval during which both the Stuart monarchy and the regime of Oliver Cromwell resorted to extraordinary tribunals to repress dissent and bolster the realm. The trigger for the development of the privilege was opposition to the "oath ex officio." The oath had its origin in the ecclesiastical courts and was commonly used by special tribunals such as High Commission and Star Chamber, but not by the common law courts. The oath procedure was often the basis for a "fishing expedition" conducted without prior charge, or extending into matters

unrelated to such charges as were made. For refusal to take an oath and make responsive answers the witness could be subjected to physical compulsion.<sup>3</sup>

Lurking in the background of virtually all of the cases in this formative period was the factor of religious or political persecution—an attempt to use the power of judicial process to coerce orthodoxy in faith or politics. The cases were one facet of the seventeenth century struggle to contain the monarchy and subordinate it to the instruments of popular government. It is striking that the landmark cases in the development of the privilege did not involve the compulsory disclosure of crime in the usual common law categories of offenses against persons, property, or the public peace.

Decades, indeed centuries, of development came to a head in the career of John Lilburne, a Puritan and subsequently a leader of the Leveller party which under the Commonwealth sought extension of popular democracy, a written constitution, and an abolition of preferments based on property. The experiences and

<sup>3</sup> These two paragraphs are perforce a brutal condensation of a long sequence of developments, many details of which remain obscure despite the extensive historical scholarship which the privilege has attracted. See Lévy, *Origins of the Fifth Amendment* (1968); Mayers, *Shall We Amend the Fifth Amendment* (1959); Wigmore, *Evidence* §§ 2250-2284 (McNaughton rev. 1961). Lévy is best for the early period. His work is flawed however by a lack of legal knowledge and a cutoff date shortly after 1790 before the privilege really had become very clear either in England or America. He faults Mayers and Wigmore for inaccuracy on some historical details but he himself is weak on the relation of the privilege to the totality of constitutional guarantees in the investigatory process. Mayers' book is excellent for overview on the Fifth Amendment; and perusal of Wigmore's treatise is a must whether or not one agrees with all of the conclusions.



trials of "Freeborn John," whom Professor Levy has called the "most remarkable person connected with the history of the origins of the right against self-incrimination,"<sup>4</sup> lend valuable perspective to an understanding of the origin and original purposes of the privilege. His first offense was importing seditious Puritan books into England from Holland, sworn to in an affidavit by two confederates in 1637. Lilburne's denial of the accusation was probably a lie according to Levy,<sup>5</sup> but the crucial point was that Lilburne refused to honor the Court of Star Chamber procedure and to deny the accusation under oath, or to respond to interrogatories under oath. For this contempt he was sentenced to fines and imprisonment, and was whipped through the streets on the way to the pillory. Still defiant in the pillory he harangued the assembled crowd (until gagged) and threw them copies of the forbidden books.

In the ensuing years his pen and further persecutions brought him fame and an eventual collision with Oliver Cromwell, resulting in two more trials for his life—again before special tribunals but with use of a jury. In these trials the only "legal" issue was his authorship of certain tracts (1649 trial), and his identity as the person named in the bill of attainder (1653 trial). Although the oath process was not used, Lilburne was pressed to plead to the indictment, to respond to questions, to say whether certain handwriting was his, to say who he was. To all of this he responded with a barrage of words, and technical objections, and harangues—all non-responsive because,

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<sup>4</sup> Levy, *supra* 271.

<sup>5</sup> *Id.* at 273.

he said, the Petition of Right taught him to answer no questions "against or concerning" himself.<sup>6</sup> His basic strategy was to appeal to the jury, over the heads of the judges, and to do this he had to give them some technical basis—by his refusal to give responsive answers—for doubting authorship or identity.

In both trials he succeeded, even though in the last trial Cromwell virtually had London under martial law. The last acquittal, however, had no impact on government policy. Cromwell had Lilburne moved from Newgate prison to the Tower—"for the peace of the nation";<sup>7</sup> thence to exile on the island of Jersey; and finally back to Dover. After his death in 1657 Parliament revoked his illegal sentence.

More than "any other individual," says Levy,<sup>8</sup> Lilburne was responsible for the acceptance of the principle against compulsory self-incrimination. And his career is equally instructive on the "original meaning" and function of the privilege against compulsory self-incrimination. In the context of the time it was the sole available *means* to certain vital libertarian *ends* which we now achieve equally effectively, or more effectively, by other devices. In part it was a *jurisdictional plea*. In the regular criminal courts at this time interrogation of the accused did occur, but there was no means for compelling an answer.<sup>9</sup> Indeed, the common law courts from the outset prided themselves on avoidance of torture.<sup>10</sup> Lilburne and others were

<sup>6</sup> *Id.* at 307.

<sup>7</sup> *Id.* at 312.

<sup>8</sup> *Id.* at 313.

<sup>9</sup> Mayers, *supra* note 3 at 6.

<sup>10</sup> Levy, *supra* note 3 at 33.

tried primarily before special tribunals who did not respect this policy. From this perspective the plea against self-incrimination was a jurisdictional plea, seeking to have special tribunals conform their practice to conventional practice—analogue to modern pleas to remove certain cases from court-martial jurisdiction.

Even more significantly, the self-incrimination plea was an alternative to the as yet unborn right of *freedom of speech and press*, including freedom of vitriolic pamphleteering against the current government. Free speech not being a right, Lilburne's tactic was to use the plea against self-incrimination as a way of preventing the government from proving authorship (though he was the author as all knew). And the jury in the last two trials was rendering really a free speech-political dissent verdict. So at the outset the origin of the "Fifth" was anomalous if not confused—it was not used effectively to block torture, but as a roundabout way, in trial strategy, of vindicating an unborn right of free speech, even under a dictatorial Great Protector.

As Levy perceptively observes in his conclusion to his analysis of the "securing" of the privilege in seventeenth century England, it was *not* linked to *crimes* but to freedom of speech and religion. At issue was not investigation of common law crimes, or business crimes, or the rackets of organized crime, or routine maintenance of public order, or even politically-motivated killings, bombings or destruction of property. At issue was peaceful, if vitriolic, political and religious dissent. As he puts it:

Above all, the right was most closely linked to freedom of religion and speech. It was, in its

origins, unquestionably the invention of those who were guilty of religious crimes, like heresy, schism, and nonconformity, and, later, of political crimes like treason, seditious libel, and breach of parliamentary privilege—more often than not, the offense was merely criticism of the government, its policies, or its officers. The right was associated then with guilt for crimes of conscience, of belief, and of association. In the broadest sense it was a protection not of the guilty, or of the innocent, but of freedom of expression, of political liberty, of the right to worship as one pleased.<sup>11</sup>

At the risk of anticipating somewhat the argument yet to come in this brief, it may be observed at this point that a perception of the historical background is doubly instructive. The preeminently precious rights—now called First Amendment rights—to secure which a self-incrimination privilege was asserted by “Free-born John” Lilburne as a procedural ploy, are themselves even today not viewed as absolutes. It is still as true as it was in 1919 that the “most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” *Schenck v. United States*, 249 U.S. 47 (1919). How anomalous it would be then, in the light of history, to insist that an immunity statute designed to offer an equivalence for the privilege against self-incrimination must go beyond immunizing the testimony and its fruits, and offer an absolute immunity from any prosecution related to the testimony. Even the Fifth Amendment itself does not operate as a pardon. Defendants who refuse to take the stand are convicted on other evidence with regularity.

<sup>11</sup> *Id.* at 332.



## B. Reception of the Privilege in America

Once we leave the time of John Lilburne we enter into a sea of confusion concerning the breadth of the privilege against self-incrimination as received into the common law, the extent to which it was later embedded in constitutional law, the gradual changes both broadening and contracting the perceived scope of the privilege, the timing of these changes, and the different developments in England and America. The questioning of the accused at his trial gradually ceased and was replaced with a right of the accused not to take the stand—not, however, because of self-incrimination but because of the common law rule that self-interest made parties incompetent as witnesses.<sup>12</sup> Subsequently, the right not to have adverse comment made on his failure to take the stand was added. More importantly for our purposes, what had begun only as a protection for the accused was gradually extended to an ordinary witness, albeit the record is confused and dates are much in dispute.<sup>13</sup>

Particularly significant is the fact that the privilege against compulsory self-incrimination, especially with regard to witnesses, was sufficiently unclear in American practice at the time of the constitutional convention that the Fifth Amendment language does not in terms apply to witnesses (or even to parties) in all situations. The language of the Fifth Amendment is narrower than the apparent common law practice at the time in some states, and far narrower than our cur-

<sup>12</sup> Mayers, *supra* note 3 at 17.

<sup>13</sup> *Id.* at 290-91. See also Levy, *supra* note 3, at 368, 402-04, who, however, does not always keep in mind the distinction between the accused and the witness in regard to the privilege.

rent constitutional interpretation of the scope of the privilege. The amendment provides only that "No person . . . shall be compelled in any criminal case to be a witness against himself."

Reacting not merely to these words but also to legislative history, Mayers has constructed a very plausible argument for the proposition that the Fifth Amendment was not intended to apply to witnesses in any proceeding, thus making it a protection only for the criminal defendant himself. He reaches this conclusion by an analysis of the narrow language of the contemporaneous (and some subsequent) state constitutions which focussed only on the accused, the similar focus of early drafts of the Fifth Amendment preceding Madison's draft, and the insertion of the phrase "criminal case" by Congress in the Madison draft.<sup>14</sup> Although objecting to Mayers' interpretation, Levy never really comes to grips with the full sweep of Mayers' analysis. He does concede that the question whether the "framers of the Fifth Amendment intended it to be fully co-extensive with the common law cannot be proved—or disproved."<sup>15</sup> It also may be noted that Chief Justice Marshall did not refer to the constitutional clause when he sustained the right of a witness not to answer an incriminating question in Burr's trial. *In re Willie (United States v. Burr)*, 25 Fed. Cas. 38 (C.C.Va. 1807).

<sup>14</sup> Mayers, "The Federal Witness' Privilege Against Self-Incrimination: Constitutional or Common Law?", 4 *J. of Leg. Hist.* 107, 108-19 (1960). Mayers also surveyed early nineteenth century treatises on the law of evidence and found that what we now call the privilege against compulsory self-incrimination was ignored or received casual mention. Mayers, *supra* note 3, at 315-16.

<sup>15</sup> Levy, *supra* note 3, at 429-30.

It is not our intention to re-fight the battle of historical interpretation. Whatever its original meaning, it has been clear since *Counselman v. Hitchcock*, 142 U.S. 547 (1892), that the Fifth Amendment privilege may be invoked by a witness as well as by the accused, and the privilege has been extended beyond the "criminal case" to all official proceedings in which self-incrimination arises. What this historical analysis does suggest is that we are dealing with a value which was quite murky in its inception. Once divorced from the freedom of speech interest with which the rise of the privilege was associated in the seventeenth century, the privilege was *not* perceived as being of the highest priority for protection as a constitutional absolute in all circumstances. Hence this history argues against the view that the self-incrimination privilege is so preeminent and unique that it can be replaced only by the extraordinary device of absolute immunity, rather than by the conventional use-restriction or exclusionary immunity which adequately safeguards other important constitutional interests concerning coerced confessions or search and seizure violations.

## II. PRE-COUNSELMAN V. HITCHCOCK CASES CONSTRUING STATUTES OR IMMUNITY GRANTS SUGGEST THAT ABSOLUTE IMMUNITY IS NOT REQUIRED.

### A. Pre-Nineteenth Century Examples

The very occasional early instances of giving "indemnity" to overcome self-incrimination in England or the colonies present a mixed and uncertain picture and have little relevance to the present day. Some indemnities, as they were called, seemed to be of a limited "use-restriction" nature, others may have been broader. There are examples of ad hoc indemnities created for particular witnesses who were obvious law breakers;

these indemnities operate on the nature of a pardon, which is of course a broad act of grace not necessarily related to the self-incrimination issue.<sup>16</sup>

The scope of indemnity was seldom clear by modern standards, which distinguish *three* types of immunity: (1) prohibition of direct use of the testimony in future prosecution (limited use immunity); (2) prohibition of direct use of the testimony and any fruits derived therefrom (full use immunity);<sup>17</sup> (3) prohibition of prosecution for any transaction related to the compelled testimony (absolute or "transactional" immunity). For example, in New York in 1772 a use restriction immunity provision in lottery legislation immunized offenses only under that specific act; and in a Pennsylvania legislative inquiry into seditious speech in 1758 immunity was offered, again apparently only in the context of the particular offense under inquiry.<sup>18</sup> See also the following early English cases which either support the foregoing comments or are simply ambiguous on these issues. *Lord Chancellor Macclesfield's Trial*, 16 State Trials 767, 921, 1147 (1725); *Bishop Atterbury's Trial*, 16 State Trials 323, 604 (1723) (ad hoc immunity grant); 1742 investigation of Robert Walpole, broad ad hoc statute but apparently not absolute in the sense of barring all related prosecutions even if based on independent testimony, 8 Wigmore,

<sup>16</sup> See, e.g., the 1760 use of pardons in the interrogation of New York ship captains in a trading with the enemy investigation, Levy, *supra* note 3, at 389.

<sup>17</sup> "Testimonial" immunity is an awkward term sometimes used at this point, but it fails to distinguish the limited, direct use immunity statutes from those fully safeguarding against both direct and derivative use.

<sup>18</sup> Levy, *supra* note 3, at 403 (N.Y.) and 385 (Pa.).



*Evidence* § 2281 n.3 (*McNaughton* rev. 1961); *Rex v. Warickshall*, 1 Leach's Crown Cases 263, 264 (1783) (allowing even use of fruits of the poisonous tree in extorted confession case).

There is no indication that any of these early legislators were even thinking of the three varieties of immunity noted above. It is apparent that they viewed the danger primarily in terms of direct use of incriminating testimony, and the actual wording of the immunity statute was happenstantial. However, in the context of most of the inquiries of that day, no derivative use was likely anyway, so that even a limited direct-use immunity provision gave adequate protection.

It is significant that once immunity statutes began to develop in the context of modern governmental law enforcement needs, to which we now turn, the developed practice in England and Canada was to employ a use restriction rather than the absolute immunity concept. And the same was true in many of the American states whose experience with immunity statutes antedated the federal experience and was discussed in *Counselman v. Hitchcock*, *supra*.

## **B. Nineteenth Century American Practice**

When we turn to the American practice in the nineteenth century we again find little support for an absolute immunity concept. The dominant theme that emerges is intellectual confusion between the common law privilege and the constitutional language, and uncertainty concerning both. The next theme that emerges is that use restriction rather than absolute exoneration was deemed adequate to satisfy the privilege—insofar as the issue was raised at all because im-

munity statutes were rare. A third theme finding some support is that immunization of the privileged testimony alone would be adequate to satisfy the privilege, without need to immunize the "fruits."

The idea that the privilege included self-infamy, which had never been clearly established, also faded away. There had been intermittent intimations going all the way back to the 1500's that the law of evidence frowned not only on self-incrimination, but also on self-infamation—infamy or disgrace even though not incriminating. The suggestion, however, that the Fifth Amendment as drafted was intended to encompass self-infamy as well as self-incrimination has been labelled a "baseless concoction,"<sup>19</sup> and *Brown v. Walker*, 161 U.S. 591 (1896), expressly repudiates the self-infamy claim. A rejection of the self-infamy concept is a precondition, of course, of the validity of *any* immunity statute, whether of the absolute type, or the full use restriction type. Only complete silence can guard against self-infamy—if then.

The dominant approach in the state courts throughout the nineteenth century was that use restriction immunity, even of the sort that only barred direct use of the testimony and did not bar derivative use, was adequate to overcome a plea of the privilege against compulsory self-incrimination. Nine states upheld immunity statutes of this narrow sort: (Arkansas, California, Georgia, Indiana, Iowa, Missouri, New York, North Carolina, Vermont), and only three states rejected them: (Massachusetts, New Hampshire, Virginia). 8 Wigmore, *Evidence*, Sec. 2283 n.2 (Mc-

<sup>19</sup> Levy, *supra* note 3, at 515. For background on self-infamy see also 317-18, 515-16.

Naughton rev. 1967).<sup>20</sup> The New York court, under a constitutional clause which protected a person against being a "witness" against himself, was particularly forthright in rejecting the argument that indirect use as well as direct use of testimony must be barred, saying that "neither the law nor the Constitution is so sedulous to screen the guilty as the argument supposes." *People v. Kelly*, 24 N.Y. 74, 83 (1861).

The minority of states taking the contrary position did not themselves forthrightly embrace the other extreme—absolute immunity—but stressed the need to safeguard against the dangers of derivative use.<sup>21</sup> Their basic position was to insist only on full use restriction immunity, covering both direct and derivative use of the testimony. Their occasional use of broader "absolute immunity" language is mere loose usage.

<sup>20</sup> Anyone who peruses these early cases should be forewarned that he will encounter obtuseness and loose language, so that a proper classification of a given state's position requires a contextual analysis and careful judgment in selecting quotable language. For example, in *State v. Quarles*, 13 Ark. 307, 310-11 (1853), the court explicitly approved a limited use restriction concept, and prosecution even after immunity, provided the evidence be independent. It then talked about the need to safeguard also against peripheral dangers. On close reading this turns out to be a concern not about derivative use of immunized testimony (use and fruits), but only a concern about direct disclosures by the witness of crimes not the subject of the immediate inquiry.

<sup>21</sup> Tennessee may be an exception. A statute which appeared to offer absolute immunity (although it is unclear whether it would bar prosecution on independent evidence, which is an element of the absolute immunity concept) was upheld as sufficient to replace the privilege, as of course it should have been. *Hirsch v. State*, 8 Baxt. 89, 91 (Tenn. 1874). The dissenters in this case prevailed in a subsequent case, apparently on the ground that no immunity statute could overcome the privilege—a view not followed in federal practice under the Fifth Amendment.

The facts of the cases did not put in question the efficacy of full use restriction immunity itself, and the courts themselves did not postulate that intermediate position between limited use immunity and absolute immunity.

For example, in *Commonwealth v. Emery*, 107 Mass. 171 (1871), the court construed the state constitution as protecting against derivative use and not merely direct use, and voided a limited, direct use statute which only provided that one's "testimony" shall "not be used as evidence" against him. In doing so the court stressed that the Massachusetts constitution, unlike New York's, safeguarded not only against self-accusation but also against compulsion to "furnish evidence against himself." The court then went on to say twice that the immunity must be coextensive with the protection which "he would be secured" under the plea of privilege (exchange theory but not a pardon theory). It then added in semantically confused fashion the following: "Under the interpretation already given this cannot be accomplished so long as he remains liable to prosecution criminally for any matters or causes in respect of which he shall be examined, or to which his testimony shall relate." *Id.* at 185. Taken out of context this might sound like absolute immunity, even barring prosecution under independent evidence for an offense to which his "testimony shall relate." Taken in context, however, and surrounded by two sentences stressing the exchange theory, the court was only expressing in rounded but careless rhetoric the full use restriction theory. See further discussion of *Emery*, *infra*, in the critique of the *Counselman* opinion.

The New Hampshire court, after initially following New York in approving limited use immunity, switched



and followed Massachusetts. *State v. Nowell*, 58 N.H. 314 (1878). The two states' constitutional clauses were the same, and the New Hampshire court opened its opinion by construing its constitution as safeguarding against direct use and fruits (admissions as "sources" of incriminating evidence), thus setting up the same exchange theory which is more clearly articulated in *Commonwealth v. Emery*. In clarifying the essentials of a valid immunity statute the court said the act must relieve one of liabilities "on account of" the matter disclosed, again suggesting a needed causal connection between the disclosures and the subsequent immunized prosecution. Turning to the statute it found two clauses, a use restriction clause and an absolute immunity clause. The former, although phrased as barring use of one's testimony "as evidence, directly or indirectly" against him, arguably would not reach all derivative use; rightly or wrongly the court seems to have so treated it. For in saying that the statute would be invalid if it contained only the first clause, the court relied squarely on *Emery*, and it is clear that the Massachusetts statute in *Emery* was only a limited use statute. The court also quoted the loose rhetoric of *Emery* already discussed above. Thus, even though the second clause in the New Hampshire act was an absolute immunity clause, the court's opinion can be read as rejecting limited, direct use immunity and approving absolute immunity as adequate, without going so far as to endorse absolute immunity as a constitutional requirement. It passed up an apparent opportunity to discuss the efficacy of a full use immunity provision.

The Virginia court, under a similar state constitutional clause protecting against giving "evidence

against himself," likewise rejected a limited use restriction statute. *Cullen v. Commonwealth*, 24 Gratt. 624, 633 (1873). It pointed to the danger of derivative use, whereby the government would be led by the immunized testimony to other "means and sources of information" of incriminating nature. Hence, again the court's additional reference to the need for an "absolute wiping out of the offence as to him" must be placed in context. This would give protection, but the alternative of full use immunity was not considered. Also, in the quoted phrase, a wiping out of "the offense"—aid by a surgeon in a dueling matter in this instance—might not safeguard against other offenses disclosed such as practicing medicine without a license. Such a "complete amnesty," related *only* to the offense under inquiry, would be more narrow than full use restriction immunity.

On the basis of *Emery, Nowell* and *Cullen* it can be said that even under state constitutional clauses broader than the Fifth Amendment ("furnish evidence against himself" clause), absolute immunity was not clearly held to be mandated. And most courts in this long formative period were satisfied—wrongly in our belief—with limited, direct use immunity, thus allowing derivative use of the testimony extracted.

To the same effect are the federal cases under the same federal immunity statute, R.S. 860, which was at issue subsequently in *Counselman v. Hitchcock*. *United States v. Brown*, 24 F. Cas. 1273 (No. 14,671) (D. Ore. 1871); *United States v. McCarthy*, 18 F. 87, 89 (C.C.S.D.N.Y. 1883); *United States v. Williams*, 28 F. Cas. 670 (No. 16717) (C.C.S.D. Ohio 1872); *In re Strouse*, 23 F. Cas. 261 (No. 13,548) (D. Nev. 1871);

*In re Phillips*, 19 F. Cas. 506 (No. 11,097). (D. Va. 1869).. Indeed, the federal court in the *McCarthy* case in 1883 cited and quoted from *People v. Kelly*, *supra*, in which the New York court had explicitly said that a statute which immunized only the actual testimony, and not the fruits of the tree, was constitutional. The court, however, did not explicitly rule on this point (derivative use not being in issue in the cases), nor did the court discuss whether the federal statute should be read as a limited use immunity statute, or a full derivative use immunity statute. Arguably, the federal statute (quoted in text, *infra*) could be construed either way, because it contained the additional phrase "in any manner used against him."

**III. COUNSELMAN HOLDS THAT A LIMITED USE RESTRICTION STATUTE IMMUNIZING ONLY DIRECT USE OF THE ACTUAL TESTIMONY, IS INADEQUATE TO SUPPLANT A CLAIM OF THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION BECAUSE IT DOES NOT BAR USE OF THE DERIVATIVE "FRUITS" OF THE TESTIMONY; NO FULL USE RESTRICTION IMMUNITY STATUTE WAS BEFORE THE COURT ALTHOUGH THE MAIN BODY OF THE COURT'S OPINION INDICATES THAT SUCH A STATUTE WOULD BE CONSTITUTIONAL; THE COURT'S CONCLUDING LINES ABOUT THE CONSTITUTIONALITY OF AN ABSOLUTE IMMUNITY STATUTE IS AT BEST A DICTUM IF READ AS AN EXCLUSIVE REQUIREMENT.**

#### **A. Nature of the Statute under Litigation**

We thus come down to the landmark case of *Counselman v. Hitchcock*, 142 U.S. 547 (1892), with a strong state and federal court commitment toward a limited use restriction immunity concept, and little or no support for an absolute immunity concept. There also had been a fair amount of conceptual confusion in the opinions of these pre-*Counselman* courts, if not in the holdings, because of a failure to perceive that there are



three potential kinds of immunity, not two: (1) *limited* use immunity, which bars only direct use of the actual testimony; (2) *full* use immunity, which also bars derivative use through leads to other evidence (and which thus is even broader than an amnesty confined to a particular offense); (3) *absolute* immunity, meaning full amnesty for any offense to which any testimony relates, i.e., "immunity bath." Not to put too fine a point on it, the *Counselman* court shared this confusion, thus contributing to continued conceptual difficulties in the immunity statute field.<sup>22</sup>

The *Counselman* litigation involved an immunity statute derived from a measure passed in 1868 for the more effective administration of justice. 15 Stat. 37; and see comment of Congressman Williams, Pennsylvania, *Cong. Globe*, 40th Cong., 2d Sess. 1334 (1868). A bit of background on the experience with early federal immunity legislation is needed to put this 1868 law in perspective.

The first federal immunity statute of any kind was passed in 1857 in support of the congressional investigatory power. This law was triggered by witness recalcitrance in a congressional investigation of alleged payoffs to members for legislative favors. In its zeal to give investigating committees effective power to compel testimony, Congress enacted a broad immunity provision which could be, and soon was, abused. Phrased as an absolute immunity statute, it extended

<sup>22</sup> For a history of federal immunity legislation and litigation to 1954 see Dixon, "The Fifth Amendment and Federal Immunity Statutes," 22 *Geo. Wash. L. Rev.* 447 and 554 (1954). See also Wendel, "Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion," 10 *St. Louis U. L. J.* 327 (1966); Note, 72 *Yale L. J.* 1568 (1963).



immunity "... for any fact or act touching which he shall be required to testify." 11 Stat. 155 (1857). Embezzlers of Indian trust bonds from the Department of Interior quickly obtained immunity from prosecution. Congressman Wilson of Iowa said that "every day persons are offering to testify before the investigating committees of the House in order to bring themselves within the pardoning power of the act of 1857." *Cong. Globe*, 34th Cong., 2d Sess. 364 (1862).

Reacting against this "immunity bath" problem Congress went from an absolute immunity concept to the other extreme—a limited use immunity concept. It enacted a replacement congressional immunity statute in 1862 providing that the "testimony" of a witness "shall not be used as evidence" against him in any criminal proceeding. 12 Stat. 333 (1862). That the Congress was aware that under this statute the immunized testimony could still be used to ferret out other evidence is indicated by this comment of Senator Wade of Ohio: "That is all that a rascal ought to have at the hands of justice, even more than he ought to have." *Cong. Globe*, 37th Cong., 2d Sess. 429 (1862). What is not clear is whether Congress, in thus overreacting to the immunity bath problem, was aware of or intelligently considered the intermediate position. That position, of course, would be to enact a full use immunity statute (testimony and fruits), which would have minimized the perceived danger of immunity baths, with which they had recent experience, without leaving the witness in an exposed position as does the limited use provision.

It was against this background, and also the background of the above-discussed trend in state courts to approve limited use restriction immunity, that Congress

in 1868 enacted the first general immunity statute applicable to parties and witnesses in court and grand jury proceedings. 15 Stat. 37 (1868). In keeping with the congressional determination to avoid further immunity baths, the 1868 law, like the 1862 replacement congressional immunity statute, was phrased to immunize the actual testimony. As carried into the Revised Statutes, R.S. 860, and litigated in *Counselman v. Hitchcock* it reads as follows:

No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.

It may be noted that in one respect the language of the 1868 law was different from the 1862 law, because of the explicit prohibition against using the compelled testimony "in any manner" against the witness. This language could have been a basis for arguing that Congress intended full use immunity, i.e., prohibition of derivative use of testimony, and not mere limited use immunity.

#### **B. Litigation and Briefs in *Counselman***

*Counselman v. Hitchcock* marked a major turning point—and in part a wrong turn—in the development of immunity statute practice and theory. The case arose when a grain shipper refused to answer questions before a federal grand jury investigating railroad

rates and alleged rebates, despite the government's invocation of the 1868 immunity statute (R.S. 860). The federal circuit court refused to release Counselman from custody under this compulsory testimony law, despite the argument that the limited immunity authorized would not bar use of compelled testimony as leads to other evidence. *In re Counselman*, 44 Fed. 268 (C.C.N.D.Ill. 1890). It thus continued the dominant trend of this era to approve limited immunity grants and not to worry about use of the "fruits" of such testimony. The opinion indicates that what really bothered this court about the "fruits" doctrine was that it would even bar the testimony of an eye witness to murder, if the government would not have known of the eye witness except by illegally extracting a confession from the accused or using his immunized testimony.

The Supreme Court on appeal in *Counselman* thus was confronted with an all or nothing situation, and had to reverse unless it was willing to support the limited immunity concept. In reversing and rejecting limited use immunity the Court reached a decision to which no one now seriously objects, and which can be viewed as a proper disposition of that case.

But what was to be the basic rationale of this decision: that the critical vice of R.S. 860 was that it did not embrace the full use of immunity concept (barring direct use and fruits), or that it did not go still further and embrace an absolute immunity concept? On this question the Court received little help from the short circuit opinion, and little from the briefs of the parties.

The brief of the appellant (defendant) in *Counselman* placed heavy reliance on the three state cases, discussed extensively *supra*, which had rejected limited

use immunity. But these cases—*Emery*, *Nowell*, and *Cullen* from Massachusetts, New Hampshire, Virginia respectively—were shown above to be classifiable as full use immunity cases which did not explicitly consider the distinction between full use immunity, and absolute immunity. In his brief the appellant waffled back and forth as to his real concern, saying variously that his position was: (1) that an immunity statute under which the fruits of testimony could be used was inadequate; (2) that only an absolute immunity statute could be constitutional; (3) that no immunity statute could be constitutional because the constitutional policy is that no self-incriminating testimony shall ever be brought into existence. Brief for Appellant (Carter's Brief), pp. 26, 32-33, 42, 57.

The briefs for the appellee (the United States) also were conceptually weak and many-faceted. One brief relied on the constitutional efficacy of limited use immunity, as consistently upheld by lower federal courts and a preponderance of the state courts, *e.g.*, the oft-quoted New York opinion in *People v. Kelly*, discussed *supra*. Brief for Appellee (Attorney General Miller and Lambertson), pp. 10-15, 27. It made an ambiguous reference to the admissibility of independent evidence principle in the law of confessions, which by analogy argues against the absolute immunity concept. *Id.* at p. 16. It also fallaciously conceded that the Massachusetts, New Hampshire and Virginia cases (*Emery*, *Nowell* and *Cullen* discussed *supra*) do require absolute immunity, and tried to explain them away by saying the state constitution texts were broader than the Fifth Amendment. *Id.* at p. 25. Actually these cases, as analyzed *supra*, in this brief, rest on the need for full use restriction.



Another brief for the appellee ambiguously referred to a trial right, under involuntary confession principles, to exclude evidence derived from immunized testimony (thus hinting at full use restriction but not tying it to the Fifth Amendment as a constitutional principle). Supplemental Brief for Appellee (Asst. Atty. Gen. Parker and Lambertson), p. 10. It also suggested that R.S. 860 could be construed as barring the use of the "fruits" as well as the testimony itself, if required in order to be coextensive with the Fifth Amendment. *Id.* at pp. 16-17. This critical point however was buried in a sea of words and was overshadowed by the pounding insistence that mere limited use restriction was enough. Tucked in as an afterthought was the equally important assertion that the framers of the Fifth Amendment had no thought of barring any conviction based on *independent* testimony. But the point was left ambiguous: *i.e.*, did "independent" mean untainted; or did it mean merely independent in the sense of being provided by a person other than the immunized witness even though it was the immunized testimony which led the government to that person.

In sum, the briefs in *Counselman* never clarified the true meaning of the earlier cases in Massachusetts, New Hampshire, Virginia. The Government's main thrust was the proposition that the Fifth did not reach fruits; hence a limited use immunity statute was all right. The Government never developed adequately the concept of truly independent testimony, and the consequent lack of need for an absolute immunity concept. Handled as an afterthought was the suggestion that R.S. 860 if need be could be read as a "use and fruits" statute, and this suggestion was not supported by a delineation of legislative history.

### C. Counselman Opinion

Against this background it is not surprising that Justice Blatchford's opinion for the Court in *Counselman v. Hitchcock*, although clear on extending the Fifth Amendment to a witness as well as to a party, was far from clear on the nature of the privilege itself, or on the necessary scope of a constitutionally effective compulsory testimony act. In particular the full use immunity concept was not clearly distinguished from the absolute immunity concept.

Two things stand clearly in the *Counselman* opinion. The first is the Court's feeling—unlike the dominant trend in court decisions up to that time—that an immunity statute is insufficient to replace a plea of the Fifth Amendment if it immunizes only direct use of testimony, and not the fruits. The Court's forthright statement on this point is found at 142 U.S. 564, where the Court said that R.S. 860 would not prevent "the use of his testimony to search out other testimony," and hence was "not coextensive with the constitutional provision." The second is the Court's interpretation of R.S. 860 as only providing the former, insufficient, protection, and not the latter. The opinion could have stopped at this point, for the case was decided; but Justice Blatchford continued on.

The bulk of his opinion consists of a twenty-page review of past state and federal cases, including the 9-3 state court split on the sufficiency of limited use restriction immunity analyzed *supra* in this brief. He then summarized, and the first point was that the various constitutional provisions including the Fifth Amendment, despite slight differences in wording, ought to have the "same interpretation." And he said it would be a "reasonable construction" to follow the

full use restriction immunity theory of Massachusetts as laid down in *Emery's Case* which he quoted as follows:

the witness is protected "from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him." 142 U.S. at 585.

Justice Blatchford closed his opinion with an additional three or four paragraphs, noting that some states had satisfactorily replaced the privilege with absolute immunity statutes. It is here that he added the comment which has been the cause of so much confusion ever since, saying:

In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. In this respect we give our assent rather to the doctrine of *Emery's Case*, in Massachusetts, than to that of *People v. Kelly*, in New York. 142 U.S. at 586.

Placed in context of the loose language of the times and the total opinion, this comment is understandable, and does *not* constitute a holding that even if R.S. 860 were broadened to encompass full use restriction immunity it would still be constitutionally insufficient. On the preceding page Justice Blatchford had already approved the full use restriction concept. Significantly, even in this last quoted comment he cited the doctrine of *Emery's Case* (*Commonwealth v. Emery, supra*) as the one he was following; but that doctrine—as already shown above—is a full use immunity doctrine, not an

absolute immunity doctrine. And the doctrine of *People v. Kelly*, which he was rejecting was a limited use immunity doctrine.

At best this last comment is a puzzling dictum, and has been so labeled.<sup>23</sup> Because the Court's primary concern throughout its opinion was to get rid of R.S. 860, on the ground that its limited use immunity formula was too narrow, this comment is best viewed as constitutional rhetoric, not really rising to the level of a considered dictum.

Whether rhetoric or dictum, Justice Blatchford's comment controlled the congressional reaction to the demise of R.S. 860. Congress decided to "play it safe"<sup>24</sup> and in its next enactment went all the way to absolute immunity language, and continued this practice in additional enactments until it switched to full use restriction in 1970. 18 U.S.C. §§ 6001-6005 (1970). By dominating our immunity statute practice for 75 years, the Blatchford comment also dominated our constitutional thinking.

The absolute immunity statute, which Congress enacted a year after *Counselman* was designed to support enforcement of the Interstate Commerce Act in court or ICC proceedings (thus beginning the tradition of ad hoc statutes rather than a single general immunity statute). Sustained in *Brown v. Walker*, 161 U.S. 591

<sup>23</sup> McKay, "Self-Incrimination and the New Privacy," 1967 *Supreme Court Review* 193, at 229; National Commission on Reform of Federal Criminal Laws, *Working Papers*, "Comment on Immunity Provisions" (Dixon), vol. 2, pp. 1405-44, at 1423 (1970).

<sup>24</sup> Comment of Judge Friendly in *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of the City of New York*, 426 F. 2d 619, 623 (2d Cir. 1970).



(1896), it was copied in many subsequent statutes, federal<sup>25</sup> and state. Its operative wording is:

... no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise.... 27 Stat. 443 (1893).

**IV. THE CONCLUSION THAT COUNSELMAN DOES NOT REQUIRE ABSOLUTE IMMUNITY IS SUPPORTED NOT ONLY BY HISTORY AND LOGIC, BUT ALSO BY BRITISH AND CANADIAN PRACTICE.**

It is the contention of the amicus curiae that *Counselman v. Hitchcock*, despite Justice Blatchford's terminal peroration, should be interpreted as a constitutional requirement only for full use restriction immunity—thus leaving the question of absolute immunity to legislative-executive choice in the light of law enforcement needs. The correctness of this interpretation has already been shown to be dictated by the Blatchford opinion itself when taken as a whole, by the state precedents in states such as Massachusetts, New Hampshire, and Virginia on which Justice Blatchford was relying, by the logic of the Fifth Amendment itself, and by antecedent colonial and English history, insofar as these distant sources are relevant. The correctness of this interpretation is also supported by consistent Canadian practice, and also by British practice, of avoiding absolute immunity.

The English Parliament, like the American Congress until 1970, has preferred to handle immunity on an ad hoc basis resulting in several types of modification of the privilege with different statutory wordings, lead-

<sup>25</sup> National Commission on Reform of Federal Criminal Laws, *Working Papers, supra*, vol. 2, pp. 1444-45 (1970).

ing one commentator a few years ago to observe that the "time has come for a rationalisation of all the relevant statutory provisions."<sup>26</sup> The common practice has been to bar only *direct* use of the testimony compelled (limited use immunity), and neither to bar use of the fruits of compelled testimony, nor to provide absolute immunity. For example, the Theft Act of 1968 provides that "no statement or admission" compelled under the Act shall "be admissible in evidence against that person or . . . against the wife or husband of that person." Theft Act of 1968, c. 60, § 31. Similar limited use immunity provisions are found in the acts touching on, *inter alia*, election frauds, Representation of the People Act, 12, 13 & 14 Geo. 5, c. 68 § 123 (1949), and the repealed Larceny Act of 1916, 6 & 7 Geo. 5, c. 50 § 43 (2) (3). The limited use immunity provision of the now repealed Bankruptcy Act of 1890, 53 & 54 Vict., c. 71, § 27(2), is of special interest because it was coupled with § 27(1), repealing so much of § 85 of the Larceny Act of 1861, 24 & 25 Vict., c. 96, as relieved witnesses compulsorily examined in bankruptcy proceedings of liability to prosecution for certain misdemeanors specified in the 1861 Act. Thus in the era of *Counselman*, with its expansionist absolute immunity dictum, the Parliament was getting rid of a statute which was somewhat broader in its wording than the English custom of limited use restriction. The Army Act and the Air Force Act likewise contain immunity provisions phrased as a limited use statute ("evidence given . . . shall not be admissible") which would fall far short of absolute immunity even if liberally construed to also bar the "fruits" of such admissions.

<sup>26</sup> R. Cross, *Evidence* 233 (1958).

Army Act of 1955, 3 & 4 Eliz. 2, c. 18, § 135; Air Force Act of 1955, 3 & 4 Eliz. 2, c. 19, § 135.

◊ The Canadian immunity statute practice, like the developed English practice, has been to reject the absolute immunity concept and to authorize use restriction through statutes which in terms offer only limited use restriction, not barring use of the fruits of the immunized testimony. There are a number of ad hoc statutes, both dominion and provincial, with slightly different wording. Wigmore reports that such statutes are enforced according to their terms, without regard to their "possible inefficiency in removing all risk of subsequent prosecution through clues obtained." See 8 Wigmore, *Evidence*, Sec. 2284, p. 525; Sec. 2282 at p. 508n. For example, the Canada Evidence Act enacted in 1892, the same year that *Counselman v. Hitchcock* was decided, reads as follows:

No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him . . . [but] the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place. . . . Can. Rev. Stat. c. 307, § 5.

The courts have turned aside pleas to give the statute a full use restriction, rather than a limited use restriction effect, refusing to extend it to incriminating documents involuntarily produced, *R. v. Simpson*, [1943] 3 D.L.R. 355 (C.A.), or to "fruits" of the compelled testimony. *Re Ginsberg*, 38 D.L.R. 261, 264 (1917).

**V. THE CONSTITUTIONALITY AND EFFICACY OF FULL USE RESTRICTION IMMUNITY UNDER THE FIFTH AMENDMENT IS SUPPORTED STRONGLY BY RECENT CASES OF THIS COURT; AND THESE CASES RECOGNIZE THAT THE STATEMENT IN COUNSELMAN ON ABSOLUTE IMMUNITY WAS AT BEST A DICTUM ON AN ISSUE WHICH HAS NOT BEEN PRESENTED TO THIS COURT UNTIL NOW.**

The issue of the constitutional efficacy of a full use restriction immunity statute, in lieu of the absolute immunity gratuitously offered by Congress in all federal immunity statutes enacted after 1893, remained in limbo for years. It finally was forced to the forefront, unavoidably, as a result of the nationalization of the Fifth Amendment via the "incorporation doctrine" in *Malloy v. Hogan*, 378 U.S. 1 (1964). And the issue was resolved in favor of the efficacy of full use restriction immunity; in *Murphy v. Waterfront Commission, New York Harbor*, 378 U.S. 52 (1964).

Abstractly viewed, even under a nationalized Fifth Amendment an absolute immunity concept could have been retained (even though the concept is historically unsupportable and generically illogical as already discussed), but only at the price of aborting all related prosecutions not only in the immunizing jurisdiction, but also in all sister jurisdictions. It is true that a federal immunity may be phrased by Congress to override state law enforcement policy and bar subsequent state prosecution for an offense related to the words spoken in the federal investigation. *Adams v. Maryland*, 347 U.S. 179 (1954). The justification here, however, is congressional policy and federal supremacy.

It would be startling to assert the proposition that an "immunity bath" process under the absolute type statute of some state, e.g., Nevada, should be allowed to abort a whole range of federal prosecutions for tax, vice, commerce violations, etc., if the prosecutions



relate to the words spoken in the state investigation, or to their fruits. And would it not equally be startling to assert the same proposition regarding Nevada power even in regard to California law enforcement policy?

To avoid such a spectacle the solution as worked out by the Court in *Murphy v. Waterfront Commission* is to develop a full use restriction rule as a constitutional requirement under the Fifth Amendment to protect the reluctant witness from adverse impact of his compelled testimony. Where there is no immunity statute but compulsion occurs, this "rule in *Murphy's* case" operates as an exclusionary rule judicially imposed under the Fifth Amendment. And the same rule should mark the limits of protection owed to the reluctant witness when law enforcement needs make it necessary to resort to immunity statute procedure.

The precise holding in *Murphy*, which arose out of an interstate compact-based state investigation of waterfront corruption, was that as a consequence of the new scope of the Fifth Amendment announced in *Malloy v. Hogan*, the federal government must be barred from prosecutorial use of the state-compelled "testimony and its fruits." Although in *Murphy* there was a state immunity statute which by its terms purported to extend immunity concerning "any criminal proceeding," the Court did not rely on it for its holding. (The statute had been enacted before *Malloy* nationalized the Fifth.) Rather, the Court worked out a rule based on the Fifth Amendment itself, interpreted in the context of the needs of the federal system.

Justice Goldberg phrased the holding of the Court as follows:

... we hold the *constitutional rule* to be that a state witness may not be compelled to give testi-

mony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude moreover, that in order to *implement this constitutional rule and accommodate the interest of the State and Federal Governments* in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled *testimony and its fruits*. (378 U.S. at 79.) (Emphasis added.)

Justice Goldberg's footnote for this statement, further explaining his meaning, reads as follows:

Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that its evidence is not tainted by establishing that it had an independent, legitimate source for the disputed evidence. (*Ibid.*)

Justice White, concurring, made a similar but more explicit statement concerning the scope of the constitutionally required protection in this situation: He said:

The Constitution does *not* require that immunity go so far as to protect against *all prosecutions* to which the testimony relates, including prosecutions of another government, whether or not there is any causal connection between the disclosure and the prosecution or evidence offered at trial. In my view it is possible for a federal prosecution to be based on *untainted evidence after a grant of federal immunity* in exchange for testimony in a federal criminal investigation. Likewise it is possible that information gathered by a state government which has an important but wholly separate purpose in conducting the investigation and no interest in any federal prosecution will not in any man-

ner be used in subsequent federal proceedings, at least "while this court sits" to review invalid convictions. *Panhandle Oil Co. v. State of Miss.* ex rel. Knox, 277 U.S. 218, at 223, 48 S.Ct. 451, 72 L.Ed. 857 (Holmes, J., dissenting). *It is precisely this possibility of a prosecution based on untainted evidence that we must recognize.* For if it is meaningful to say that the Federal Government may not use compelled testimony to convict a witness of a federal crime, then, of course, the Constitution permits the State to compel such testimony . . . . I believe the State may compel testimony incriminating under federal law, but the Federal Government may not use *such testimony or its fruits* in a federal criminal proceeding. Immunity must be as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination. (378 U.S. at 106-107.) (Emphasis added.)

After this breakthrough in *Murphy*, responsive to the difficulties with absolute immunity in a federal system, and also having the effect of restoring the Fifth Amendment to the realm of rational discussion, developments on use immunity followed rapidly. It was perceived that full use immunity was really the same as the familiar exclusionary rule which has been our constitutional safeguard in the coerced confession line of cases from *Brown v. Mississippi*, 297 U.S. 278 (1936) down through *Miranda v. Arizona*, 384 U.S. 436 (1966) and on to the present. It is the same rule which has guided search and seizure litigation in federal courts since *Weeks v. United States*, 232 U.S. 383 (1914), and in all courts since *Mapp v. Ohio*, 367 U.S. 643 (1961). The exclusionary rule also governs the still-developing litigation concerning unauthorized electronic eavesdropping, *Alderman v. United States*, 394 U.S. 165 (1969).

The use restriction concept has enabled the Court to make sense out of the delicate balance of individual

and public interest concerning dismissal of public employees who block inquiries into their discharge of their public trust by pleading self-incrimination. A public employee may not be coerced into incriminating himself by threat of discharge if he remains silent, *Garrity v. New Jersey*, 385 U.S. 493 (1967), and may not be coerced by threat of discharge into signing a waiver of immunity against subsequent criminal prosecution. *Gardner v. Broderick*, 392 U.S. 273 (1968), and *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280 (1968). Noncooperative conduct in the face of such inquiries, however, hardly qualifies as a certificate of merit. Hence Justice Fortas in his separate comment on *Garrity*, 385 U.S. at 519, and in his opinion for the Court in *Gardner* and *Uniformed Men* worked out the proposition that a Fifth Amendment pleading public employee who is immunized against incriminating use of his answers may be dismissed. He phrased the constitutional principles as follows, in *Gardner*:

Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying. 392 U.S. at 276.

If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. State of New Jersey, supra*, the privilege against self-incrimination would not have been a bar to his dismissal. 392 U.S. at 278.

This explicit dictum of the Court in *Gardner* and *Uniformed Men* came to fruition on remand in a ruling



of the Court of Appeals for the Second Circuit supporting public discharges of certain New York City employees. The court said that " 'use immunity' suffices for the discharge of public employees who 'refuse to account for their performance of their public trust.' " *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of the City of New York*, 426 F.2d 619 at 626 (2d Cir. 1970); accord, *Silverio v. Municipal Court*, 247 N.E.2d 379, cert. denied, 396 U.S. 878 (1969).

To similar effect on Fifth Amendment theory is the subsequent development and clarification of *Spevack v. Klein*, 385 U.S. 511 (1967) in which the Court held that an attorney who was the subject of an ambulance-chasing investigation could not be disbarred for pleading self-incrimination and refusing to testify and produce his financial records. A review of post-*Spevack* cases in New York indicates that the holding is limited to those rare situations where there is *no independent evidence* of misconduct on the part of the licensee, and the licensee has merely refused to answer questions by pleading the Fifth Amendment. In short, there is a use-restriction effect, not exoneration. Franck, "The Myth of *Spevack v. Klein*," 54 A.B.J.A. 970 (1968). Nothing here supports the argument that absolute immunity, rather than full use restriction, is needed to overcome a claim of the Fifth.

To be sure, because the landmark *Murphy* ruling came in a case which was technically not an immunity statute case as handled, the Court has on occasion noted that the ultimate meaning of *Counselman v. Hitchcock* may still be open. But these comments really express little more than a decent respect for the principles of standing, and ratio decidendi. For example in *Stevens*

✧ *Marks*, 383 U.S. 234 (1966) which was a narrow case concerning only capacity to withdraw a "waiver" of the Fifth Amendment and immunity, the Court said it was not reaching the distinction between full use immunity and absolute immunity.

However, in the same term of the Court in *United States v. Blue*, 384 U.S. 251 (1966), the Court said that if the government had acquired evidence in violation of the Fifth Amendment, the remedy would be to suppress the evidence and its fruits, not to dismiss the indictment as requested by Blue. The opinion of Justice Harlan for a unanimous Court contains this comment: "So drastic a step [barring prosecution altogether] might advance marginally some of the ends served by the exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book." 384 U.S. at 255.) See also on testimonial use restriction in an analogous search and seizure situation *Simmons v. United States*, 390 U.S. 377 (1968). The only recent repetition of the *Counselman* dictum came before *Stevens* and *Blue* in a case in which the distinction between full use immunity and absolute immunity was not in issue, or discussed. In *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), the Court struck down a patently insufficient immunity statute of the limited use variety, and it is clear that its holding was that an immunity provision which does not bar fruits too is unconstitutional.

Even more significantly, the 1968 "Bookie Tax" and Gun Registration cases virtually approve sub silentio the principle that an exclusionary rule in the form of a full use restriction immunity statute is adequate to preserve the interest safeguarded by the Fifth Amend-

ment. *Marchetti v. United States*, 390 U.S. 39 (1968), *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968). The Government urged the Court to save the registration requirements at issue by judicially imposing a use-restriction, as in *Murphy*. The Court said the suggestion was "in principle an attractive and apparently practical resolution of the difficult problem before us." *Grosso, supra*, at 60. However, the Court rejected the suggestion on statutory interpretation grounds, noting the clear intent of Congress that gambler registration information be made available to state and federal prosecutors. The Court was willing to adopt use restriction, but could not do so because the statute itself actually encouraged promulgation of the incriminatory information.

The use restriction dictum in these cases came to fruition in *United States v. Freed*, 91 S.Ct. 1112 (1971), when the Court sustained the redrafted firearms registration statute. Under the new act the registration is accomplished by the transferor, but he must provide the photograph and fingerprints of the transferee. However, the information filed is not to be disclosed to any law enforcement agency; and there is an immunity provision barring use of the information or its fruits against a registrant or applicant to prove offenses prior to or concurrent with registration. Justice Douglas for the Court said that the nondisclosure provision, "combined with the protection against use . . . satisfies the Fifth Amendment." 91 S.Ct. at 1117. He did append a cryptic footnote purporting not to reach the question of full use immunity as opposed to absolute ("transactional") immunity because under the act "the hazards of self-incrimination are not real." Registration, however, could be accom-

plished by deception, and administrative nondisclosure provisions can be a leaky sieve. The crucial reason the hazard is "not real" is the existence of the *full* use immunity provision, which plugs the leak even if there be one. It is difficult to believe the Court would have upheld the new firearm registration law without the immunity provision.

That the immunity provision was crucial is indicated by Justice Brennan's concurring opinion. He doubted that there was much possibility of federal self-incrimination, provided the registration was "effective," but did see a possibility of self-incrimination under California's law outlawing possession of hand grenades. As to this latter danger he said that the "immunity provision suffices to supplant the constitutional protection." 91 S.Ct. at 1119. His footnote comment at this point saying that absolute ("transactional") immunity was not involved because the self-incrimination danger was under the law of another jurisdiction—which envisions two-levels of immunity statute stringency under one Fifth Amendment—will be dealt with in a separate section, *infra*.

**VI. FULL USE IMMUNITY IS CONSISTENT WITH THE DEVELOPED PURPOSES OF THE FIFTH AMENDMENT, AND IS URGENTLY NEEDED FOR EFFECTIVE POLICING OF THE GROWING CATEGORIES OF CRIME CHARACTERIZED BY A WEB OF INTERLOCKING ILLEGAL AGREEMENTS AMONG MANY PEOPLE, SUCH AS "WHITE COLLAR" CRIME AND ORGANIZED CRIME.**

#### **A. Immunity and the Policy of the Fifth Amendment**

It would extend the brief unduly to embark on an extensive discussion of the various supposed "policy" bases for the privilege, and the purposes it is designed to serve. Virtually all of the major views pro and con on an expansive reading of the privilege are reviewed



and criticized in extenso in Wigmore, and the current writings have recently been collated and evaluated.<sup>27</sup> McCormick, McNaughton, Wigmore and others<sup>28</sup> suggest that the problem of physical coercion of witnesses is now safeguarded by due process, that the problem of political dissent is now safeguarded by the First Amendment, that a whole cluster of clauses in the Bill of Rights safeguard the core of the "accusatorial" method of law enforcement as distinct from the inquisitorial method, and that what is now left for the Fifth Amendment—although still very important—is of somewhat smaller compass than the romantic seventeenth century aura which still surrounds it.

To paraphrase a comment made in a similar connection, the present danger is not so much that the values remaining in the Fifth will be subjected to "the erosion of plausible exceptions,"<sup>29</sup> as that these values will be expanded by a process of plausible additions to offer gratuities to crime. The essential value inhering in the Fifth Amendment—and it is an elemental and precious value—is that an offender *shall not be forced* by contempt process or other pressure *to help convict himself*, or as the more liberal state constitutions in the last

<sup>27</sup> 8 Wigmore, *Evidence*, § 2251 (McNaughton rev. 1961); Friendly, "The Fifth Amendment Tomorrow: The Case for Constitutional Change," 37 *U. Cin. L. Rev.* 671, 679-95 (1968).

<sup>28</sup> McCormick, "Law of the Future: Evidence," 51 *Nw. U. L. Rev.* 218, 221-22 (1956); McNaughton, "The Privilege Against Self-Incrimination," 51 *J. Crim. L. C. and P. S.* 138 (1960). Wigmore's views are summarized by McNaughton in 8 Wigmore, *Evidence*, § 2251 n. 1 (McNaughton rev. 1961). See also Mayers, *supra* note 3, and Friendly, *supra* note 27.

<sup>29</sup> Book Review of Mayers, *Shall We Amend the Fifth Amendment?*, 9 *J. of Pub. Law* 214, at 220 (1960).

century phrase it—to furnish evidence against himself involuntarily in a criminal matter. See discussion *supra* of *Emery's Case*, *State v. Nowell*, *Cullen v. Commonwealth*.

This value obviously is not well served by a limited use immunity statute, of the sort traditionally employed, and still employed, in England and Canada which does not immunize the fruits of the compelled disclosure. This value is fully served by a full use immunity statute covering both direct and derivative use of the compelled testimony—the kind of statute at issue in *Zicarelli*, and at issue in the cases resting on the new general federal immunity statute enacted in 1970, 18 U.S.C. §§ 6001-6005. *Stewart v. United States* and *Kastigar v. United States*, 440 F.2d 954 (1971), *cert. granted*, 39 U.S.L.W. 3511 (U.S., May 17, 1971). This value is wastefully served by a process of overkill in the absolute immunity statutes which Congress was induced to enact by the *Counselman* dictum discussed *supra*, which Congress repealed and replaced with full use restriction in 1970. Absolute (“transactional”) immunity does not merely safeguard a person from furnishing incriminating evidence against himself. It pardons him wholly for any offense related to his testimony, without any regard for the possible existence of a verifiable case against him based on wholly independent evidence. It is wholly out of line with the exclusionary rules which safeguard all other constitutionally-under-girded evidence principles derived from the common law, *e.g.*, search and seizure and coerced confessions.

As Justice Holmes has said, general propositions do not solve concrete cases. History and logic carry us only so far. The *history* of the self-incrimination privi-

lege points ambiguously either toward limited use immunity (only testimony immunized), which is the English and Canadian practice, or toward full use restriction immunity (testimony and fruits), which was the basis of the more liberal state decisions on which the Court relied in *Counselman*. The logic of the Fifth Amendment is *not* satisfied with limited use immunity; it dictates full use immunity, like the current New Jersey statute at issue in *Zicarelli*, and the 1970 federal witness immunity statute, 18 U.S.C. §§ 6001-6005. The logic of the Fifth Amendment is actually offended by an absolute immunity concept: why pardon a person for unknown crimes, or known crimes for which you already have adequate proof? Absolute immunity statutes also pose a problem of moral values, because their effect is to absolve a person of moral culpability without any voluntary "regenerate" act on his part; full use restriction retains our moral values concerning actual or putative legal guilt, even if independent evidence is required for proof.

#### **B. Immunity in the Context of Historical Development and Need**

When we move from the general to the particular and place immunity legislation in the context of the modern crime picture, the case for full use restriction immunity becomes overpowering. Ordinary crime, street crime, the conventional common law offenses, are really of little concern to immunity legislation. Conventional law enforcement techniques of patrol and questioning, as augmented by the modern crime laboratory, are our main reliance. It is when we move to multi-party offenses, often conspiratorial in nature and resting on a web of interlocking agreements, that the immunity technique is needed. And these are the very



areas where a wide and casual use of the pardon power (absolute immunity) would be most reprehensible.

The need for immunity statutes has passed through several phases. In the first place the need for them would not be great under any circumstance until the common law privilege against compulsory self-incrimination slowly developed to a relatively high level of sophistication and breadth, and became undergirded with constitutional compulsion. This took a surprisingly long time—not until 1892 for the federal government.

In the second place the need was not great so long as crimes were relatively simple, and regulatory administration had not developed significantly. Many early immunity statutes are found in the context of investigations of official corruption in the liquor business<sup>30</sup> or in legislative bodies.<sup>31</sup> Offenses of this sort are not disclosed by eye witnesses and evidentiary traces such as fingerprints. These offenses are often conspiratorial in nature, operating through a series of illegal understandings among several people, and require an extensive interrogation technique to uncover.

<sup>30</sup> See, e.g., *Emery's Case*, *supra*, investigation of bribery and corruption in the state police; *State v. Nowell*, *supra*, liquor business. Other major categories are found on analysis to involve peripheral use of immunity concepts in civil litigation arising out of usury, insolvency, and judgment debts, where disclosures relevant to the civil suit were protected, for instance, against subsequent use in fraud prosecutions. See Wigmore, *supra*, § 2283 n. 2.

<sup>31</sup> *People v. Kelly*, *supra*, acceptance of money by New York City councilmen to influence their votes. As discussed *supra*, the first federal immunity statute, 11 Stat. 155 (1857), was enacted in support of a congressional investigation of alleged sale of legislative favors.



As Justice White phrased it in *Murphy v. Waterfront Commission*:

Such statutes have for more than a century been resorted to for the investigation of many offenses. Chiefly, those whose proof and punishment were otherwise impractical, such as political bribery, extortion, gambling, consumer frauds, liquor violations, and racketeering. 378 U.S. 52 (1964), concurring opinion at p. 94.

Third, as offenses based on interrelated illegal understandings and operations increased markedly with the rise of regulatory administration exemplified by the Interstate Commerce Commission and other federal and state commissions, the need became pinpointed and immunity statutes flowered. On an ad hoc basis immunity provisions were inserted in virtually every major federal regulatory act from 1893 to 1970, at which time Congress replaced the hodgepodge of immunity legislation with an integrated general immunity statute. 18 U.S.C. §§ 6001-6005 (1970).

Fourth, the increasing tendency in vice and related fields for businesses to operate on the edge of the law or outside the law—developing into the colossus we now call organized crime—greatly increased the number of offenses resting on a complex web of illegal understandings. In the area of white collar crime, particularly, violations often are difficult to detect except through interrogation techniques which may induce a plea of the Fifth, and a consequent need to desist or immunize.<sup>32</sup>

<sup>32</sup> Regarding difficulties in detection and proof of antitrust violations, consumer fraud, and other white collar crimes, and the need for interrogation without risking immunity baths, see Edelhertz (National Institute of Law Enforcement and Criminal Justice), *The Nature, Impact and Prosecution of White-Collar Crime* 35, 39, 42, 69 (1970).

And in that special area of "white collar" crime which we call organized crime, whose influence ranges from an ordered assault which may have been the underlying basis for *Piccirillo v. New York*, 400 U.S. 548 (1971) through "polite" society to controlling unions, businesses, public elections and some governments, such techniques as immunity statutes and court-ordered eavesdropping have been shown to be especially effective law enforcement techniques.<sup>33</sup> If organized crime is not curbed nationally, such truly fundamental constitutional values as a fair election, a fair count, and fair representation would become a mockery.

The American Civil Liberties Union, although fundamentally taking a position against any immunity statute, perceived this point in testimony in House hearings on the federal immunity bill in 1970. The A.C.L.U. conceded that there were special problem situations in law enforcement where the immunity technique could be meritorious: "One might decide it is worth it in the area of organized crime where the terroristic methods of the criminal organization or the reluctance of witnesses to give evidence, makes prosecution difficult." Hearings, Subcommittee No. 3, Committee on the Judiciary, House of Representatives, 91st Cong., 1st Sess. Aug. 7, 1969, p. 81.

Fifth, to this category of conspiratorial crimes marked by "terroristic methods," we must now add the offenses of politically motivated violence by some dissident groups determined to bring the "Establishment" to its knees. In theory, if not in accomplished practice,

<sup>33</sup> Survey story indicating that the new tools of law enforcement have increased prosecutions aimed at gambling operations of organized crime. N. Y. Times, June 7, 1971, p. 26, cols. 3-6.

this development harks back to nineteenth century European anarchism. The continuum action ranges from spasmodic hit and run attacks, bombings, killings of public servants, wanton destruction of property, to organized guerrilla tactics aimed to shut down public facilities. Such actions completely transcend any level of permissible political dissent protected by the First Amendment. This is not the tradition of "Freeborn John" Lilburne.

Such disparate groups as the policeman and the researcher on the college campus may have more to fear from this source than from organized crime. Between January 1, 1969, and April 15, 1970 there were a total of 4,330 explosive and incendiary bombings in the United States. Hearings, Permanent Subcommittee on Investigations, Committee on Government Operations, United States Senate, 91st Cong. Second Sess. Part 24 p. 5341. Since that period, the capitol of the United States has been bombed, and since January of 1969, 51 federal buildings in this country have been bombed, resulting in one death. *Washington Post*, March 11, 1971, p. 3, col. 2. At least 18 policemen nationwide were killed in terroristic attacks in 1970. *Life Magazine* November 13, 1970, p. 36D.

In terroristic crime situations associated with loss of life, whether caused by organized crime or by politically-motivated violence, the prosecutor understandably may hesitate to offer immunity to any witness if the price is an immunity bath, rather than full use restriction. And yet a "rule or ruin" type of crime rooted in an ends justifies the means philosophy requires responsible law enforcement of the most sophisticated sort, including extensive use of the interrogation technique.

There has been some recent concern about what might seem to be an undue extension of powers of investigatory bodies over reluctant witnesses, especially those associated with unpopular causes or extreme political views. However, a mere shift from absolute immunity to full use restriction immunity would not have appreciable impact on the kinds of abuses charged to some investigating committees in the 1950's and early 1960's. There the crucial problem was the legitimacy of the investigation and the relevance of the information sought to any legitimate governmental purpose,<sup>34</sup> and there was no judicial supervision of the sort available in immunity practice. The activities being investigated in the Fifties were unassociated with the kinds of acts of criminal violence which are the target of current investigation. And of course a disposition toward total dissent and noncooperation cannot be overcome either by full use immunity or absolute immunity.

Most law enforcement in both the accusatorial and inquisitorial systems starts with asking a question, the distinction being that in the former system there are restraints on browbeating the *defendant* himself, but *not* a hands-off policy on all witnesses. The more subterranean and complex an offense category becomes, involving multiple understandings among numerous people, the more vital becomes the process of interrogation as a law enforcement technique for social defense.

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<sup>34</sup> See *Watkins v. United States*, 354 U.S. 178 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Deutch v. United States*, 367 U.S. 456 (1961); *Russell v. United States*, 369 U.S. 749 (1962); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); see also *Barenblatt v. United States*, 360 U.S. 109 (1959) and *Updegraff v. Wyman*, 360 U.S. 72 (1959).



**VII. IMPLEMENTATION PROBLEMS ARE NOT MORE SERIOUS IN USE IMMUNITY THAN IN ABSOLUTE IMMUNITY; IF ANYTHING, IMPLEMENTATION CONSIDERATIONS POINT TOWARD UTILIZATION OF FULL USE RESTRICTION STATUTES RATHER THAN ABSOLUTE IMMUNITY STATUTES.**

**A. Practical Problems and Perspectives in Implementing Immunity**

Several observations may be made concerning the practicalities of full use restriction immunity, leading up to the larger question of whether it poses undue dangers for the witness.

First, it can be observed that a conversion from absolute immunity to full use restriction immunity will avoid the litigation that occurs under absolute immunity on the issue of "relatedness." To qualify for protection even under absolute immunity a person must show that his subsequent prosecution is related to his prior testimony. Because federal grand juries were not equipped with broad immunity authority until recently, and because immunity grants are relatively rare among administrative agencies, there has been little opportunity for federal litigation on this point. But *Piccirillo v. New York*, 400 U.S. 548 (writ of certiorari dismissed, 1971) indicates the difficulties which can arise. As discussed more fully *infra* in Subsection C, the New York court and some members of this Court disagreed on the question whether the witness' testimony on assault and criminal conspiracy was sufficiently related to a bribery indictment handed down by the same grand jury to qualify for immunity. And on this issue the burden of proof rests on the witness.

Further, if the "relatedness" issue in absolute immunity is handled by resolving all doubts in favor of the witness, which would be consistent with the general tendency on other issues touching the Fifth Amend-

ment such as the tendency to incriminate doctrine, other dangers arise. Organized crime figures could then "bathe" in a ban against prosecution for crimes remotely related to their testimony, and for which the government has prior, concurrent, or subsequent independent proof. Such an immunity would seem to be wastefully broader than is required by the spirit of our accusatorial system. By contrast, a use restriction formula can be, and indeed should be, construed broadly in favor of the witness in all doubtful cases, *without* creating the automatic immunity bath which flows from the absolute immunity concept.

Second, more complete and more truthful disclosure may result if full use immunity rather than absolute immunity is employed. Under absolute immunity a witness gets immunity whether he tells the truth or not, so long as he created a "relationship." He thus has little incentive to tell very much, or to tell it truthfully, bearing in mind that proof of perjury is difficult. Under full use immunity, the more he discloses the greater likelihood there is that something he says will provide a basis for arguing later that his testimony provided a lead from which the government could have derived its "independent" testimony. Thus, from the witness' standpoint, the more he says—and it must be truthful to be effective—the heavier he makes the government's burden to show a non-derivative, wholly independent source.

Third, on the negative side it might be argued that full use restriction immunity may discourage testimony because the possibility of a future prosecution still remains. But on analysis this assertion falls apart. The witness will face contempt if he refuses to accept full use immunity. As just noted, the more he says the

more likely is he to make prosecution on an independent evidence theory impossible. The public benefits, and the witness is fully protected. Under these conditions it would not be expected that subsequent prosecutions will occur as a matter of course, but where they do occur (on a showing of independent evidence) they will be especially significant because of the type of crime involved.

Fourth, if absolute immunity were the only way a legislature could constitutionally provide this necessary avenue to obtaining evidence, two further consequences, both disadvantageous to the fair administration of justice would follow, one touching on equal protection values, the other touching on the need to discourage inducements to untruthful testimony. Regarding equal protection, it is of course inherent in the immunity process that the immunized testimony gotten from one offender may be used to build a case against another offender. This is often the only way to "crack" some group crimes. This differential treatment of the two offenders is maximal under an absolute immunity statute because the one immunized obtains a complete pardon while the other may go to jail. Under full use restriction the possibility of conviction under independent testimony remains, and the degree of "inequality" is lessened. Regarding the interest in truthful testimony, under an absolute immunity concept, the prosecution is empowered to offer the maximum inducement—a pardon—for favorable testimony. In some cases such excessive immunity might be expected to produce testimony more helpful to the state than sincerity would permit.

### B. Effectiveness of Full Use Restriction Immunity

We come now to what is probably the major issue concerning full use restriction immunity: will it adequately safeguard the witness, or will the difficulties of policing it prove to be so great that the use restriction becomes an illusory promise? The short answer, of course, is to refer to the areas of confessions and search and seizure where the exclusionary rule already is a part of our constitutional system. There is no reason to assume that judicial policing of the exclusionary rule will suddenly fail when it takes the form of a full use restriction immunity statute. In policing the fruit of the poisonous tree doctrine in the area of illegal search and seizure, and illegal electronic eavesdropping, the Court has had long experience in ascertaining what is and what is not "independent" evidence. There has never been a suggestion that the only way to resolve all possible doubts is to grant a pardon for any offenses which may be related to the illegally acquired evidence.

Indeed, the policing of a full use immunity provision will actually be easier than policing the equivalent exclusionary rule in the search and seizure area. There will be a known, overt, pin-pointed point in time when the witness will have made certain easily verifiable disclosures. No evidence obtained *before* that point in time should be excluded, and yet that is precisely the effect of the absolute immunity concept. Nor should any evidence existing *concurrent* or *after* that point in time be excluded either—unless there is taint.

Regarding such concurrent or subsequent evidence, and even the prior-acquired evidence, the government should be and will be under an affirmative constitutional duty of showing that the source is "independent." Thus, it is immaterial whether or not a given immunity



statute itself contains any burden of proof clause, or formula for ascertaining the "independence" of the evidence. Immunity is a response to and a replacement for a constitutional claim of privilege. When an immunity statute takes the form of a full use immunity provision, the burden of proof of "independence" devolves on the Government *automatically*, as a constitutional matter. As Justice Goldberg phrased it, in *Murphy v. Waterfront Commission* (writing in special context but giving what we will show should be general rule):

"... we hold the *constitutional rule* to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. . . .

"Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the *burden of showing that its evidence is not tainted* by establishing that it had an independent, legitimate source for the disputed evidence." (Emphasis added.) 378 U.S. at 79 and 79 n. 18.

And as Justice Brennan recently observed in *Mackey v. United States*, 91 S.Ct. 1160 (1971), had the Court acceded to the government request and imposed use restriction in *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968) (discussed *supra*), a burden of proof rule would have arisen which "would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted by any connection

with information obtained as a consequence of the wagering taxes." 91 S.Ct. at 1170, quoting from *Marchetti*, 390 U.S. 39, at 59 (1968). The reason the Court felt precluded from imposing use restriction in *Marchetti-Grosso* was that the statutory intent was an *anti-use* restriction device whereby federal registrants and taxpayers would be exposed to state criminal prosecution. Justice Brennan also alluded in his *Mackey* opinion to the "required records" doctrine which operates in the tax-regulatory fields and observed that "the privilege may not be claimed if the danger of incrimination is only that the information required may show a violation of the taxing or regulatory scheme." *Mackey*, *supra* 91 S.Ct. at 1168. But what of collateral incrimination under some other law; should that defeat the required records doctrine? The answer should be no, and the solution again should be use restriction.

If, as Justice Brennan also said in *Mackey*, the *Marchetti-Grosso* decision "does not require that, once evidence has actually been compelled, we refuse to protect a valid governmental interest by restricting use of that evidence any more than is required by the Fifth Amendment," 91 S.Ct. at 1170, then it is difficult to perceive, *contra* his own conclusion, why an offer of use restriction should not be adequate to overcome a plea of the privilege at the outset. There is to be sure, as Justice Brennan says, a distinction between a plea of the privilege which is allowed to prevent disclosure, and protecting a person after an involuntary disclosure. But if full use restriction coupled with imposition of a burden of proof on the government (which thus tips the balance against the government in doubtful cases) is adequate in the latter instance, why should it not be adequate to overcome a plea of the privilege and provide information needed by the public?

To the statements of Justice Goldberg for the Court in *Murphy* and Justice Brennan in *Mackey*, recognizing the heavy burden of proof which use restriction imposes on the government, may be added the comments of Justice Harlan in *California v. Byers*, 91 S.Ct. 1535, (1971). Commenting on the California Supreme Court's view that the common requirement that accident motorists stop and identify themselves could be juxtaposed with the Fifth Amendment by imposing a "restriction on prosecutorial use of the disclosed information and its fruits," he said:

"But that accommodation leaves the Government's capacity to utilize self-reporting schemes practically impaired by the *necessary presumption* that evidence used in a prosecution after the individual discloses his relationship to the regulated transaction *would not have been available* if the individual had not complied with the statute. . . .

"Even under a use restriction, then, the choice open to the State is to forego prosecution in at least a large number of accident cases involving illegal driving. . . ." (Emphasis added). 91 S.Ct. at 1545.

In short, it is already established that the government bears a heavy burden of showing "independence" of its evidence under a full use restriction rule. It is also quite logically assumed—in the absence of significant empirical proof to the contrary—that full use restriction systems do in practice "*work*," i.e., they do protect constitutional non-self-incrimination interests and they do hamper or bar prosecution. Indeed, it was the Court's feeling, going beyond the intermediate question of burden of proof, that use restriction would completely hamstring prosecution which led the Court not to impose use restriction in the *Marchetti-Grosso* situa-



tion. The Court said that if use restriction were imposed the Fifth Amendment interest would be protected, but "only at the cost of hampering, perhaps seriously, enforcement of state prohibitions against gambling." *Marchetti v. United States*, *supra* at 59.

In the light of our long experience with exclusionary rules, and sole reliance on them as safeguards for constitutional interest in the fields of confessions and search and seizure, it would be anomalous to maintain that this same device is insufficient to avert self-incrimination when included in an immunity statute. To advert again to *Miranda v. Arizona*, 384 U.S. 436 (1966), the rules devised in that case are likewise based on a presumption theory. Proof is difficult regarding the events taking place in the precinct station, where it may be the word of police vs. the word of the suspect. As has been said of immunity situations, most of the evidence is controlled by the government. The Court therefore in *Miranda* created in effect a presumption of police misconduct and of involuntariness of the suspect, unless certain warnings were given. The aim is to avert coerced confessions, not to exclude all confessions.

Similarly in the immunity field—which after all is a very small appendage on the criminal litigation tree by comparison to the vast confessions and search and seizure area—a strong affirmative duty on the part of the government to show independence of the evidence would provide equivalent protection. Prudent governments may also wish to experiment with systems for dating their files, expanded use of affidavits regarding the manner and time of obtaining certain evidence, and the like. Indeed, if deemed advisable after an accumulated experience record, such requirements could be



judicially imposed, as in *Miranda*, as part of the constitution-based presumption-burden of proof system. Perhaps the oldest example of a constitution-based, judicially imposed presumption system is to be found in the racial jury exclusion cases. There the Court has long protected a constitutional interest in an area difficult of proof by creating a presumption of racial discrimination if the percent of minority group on jury panels over a period of years is far smaller than that group's percent of the total area population. *Norris v. Alabama*, 294 U.S. 587 (1935); *Swain v. Alabama*, 380 U.S. 202 (1965).

It shall also be noted that the burden of proof of "independent source" in the Fifth Amendment-immunity statute situation may on constitutional grounds be made more stringent than obtains in search and seizure situations, in order to adequately protect Fifth Amendment interests. The rationale for the exclusionary rule in the search and seizure cases has been to discourage the police from violating the primary right against illegal search and seizure; it is remedial or derivative, rather than basic. *Mapp v. Ohio*, 367 U.S. 643 (1961); Comment, "Scope of Taint under the Exclusionary Rule of the Fifth Amendment Privilege Against Self-Incrimination," 114 *U. Pa. L. Rev.* 570 (1966). By contrast under the Fifth Amendment the exclusionary principle is not just remedial or deterrent. It is an integral part of the constitutional privilege itself, giving it a primary constitutional basis, as Justice Black noted in *Adams v. Maryland*, 347 U.S. 179 at 181 (1954). Hence it is judicially controlled as a primary safeguard inhering in the constitutional value, and can be as stringent as needed to safeguard that value. The Fifth Amendment (or immunity statute) exclusionary

rule therefore would not be limited by *Wong Sun v. United States*, 371 U.S. 471 (1963) or other cases which have limited the "spread of the taint" in search and seizure situations by asking not whether the evidence *did* have an independent source, but whether it *could* or *would* have been discovered through independent legal means. Under the Fifth Amendment and a full use restriction immunity principle, it would be appropriate to require proof of actual independent source, not just the possibility of evidence being gotten without the compelled testimony. And of course the Court itself in *Murphy* articulated an unqualified "independent source" test for this Fifth Amendment-immunity statute situation.

### C. Immunity in Intra-jurisdictional Context

There remains to be disposed of the contention that even if full use restriction be adequate in the context of our federal system when incrimination under the laws of another jurisdiction is at issue, it is not adequate on an intra-jurisdiction basis when self-incrimination is pleaded under the laws of the interrogating jurisdiction itself. It seems to be conceded by some of the justices who oppose full use restriction immunity in the latter context, that it is appropriate in the former context of inter-jurisdictional protection, and that such a rule derived from *Murphy v. Waterfront Commission*, *supra*, is now the law. In *Piccirillo v. New York*, 400 U.S. 548 at 567 (1971), Justice Brennan, with Justice Marshall concurring, did not reject all use immunity but said only that "'use' immunity is insufficient when the government involved is the one that has compelled the incriminating testimony." And in *United States v. Freed*, 91 S.Ct. 1112 at 1119 (1971) Justice Brennan said: "No question of transactional

immunity as raised here since the case involves incrimination under the laws of a jurisdiction different from the one compelling the incriminating information."

But on what rational basis can such a distinction be supported? Our modern communication system, personal mobility, and the interjurisdictional web of organized crime and all other types of conspiratorial crime, has given us an integrated national crime problem calling for an integrated response with a premium on interjurisdictional cooperation. In the confessions and search and seizure fields we have no rule that use restriction is adequate interjurisdictionally, but that a full pardon is mandated intrajurisdictionally.

Neither the history nor the logic of the Fifth Amendment, delineated above, mandates such a rule. It must be remembered that the constitutional principle does *not* create a general right of nondisclosure, but a right against involuntary self-incrimination. A plausible showing of possible incrimination must be made before the privilege can be invoked, and the privilege ends when incrimination is removed. The important countervailing principle often lost sight of, phrased long ago in the formative years of the privilege, is that "the public has a right to every man's evidence."<sup>35</sup> The two principles create what has been called "the essential tension that spring from the uncertain mandate" of the Fifth Amendment. *California v. Byers*, 91 S.Ct. 1535 at 1549 (1971), Justice Harlan concurring.

<sup>35</sup> Words of Lord Chancellor Hardwicke, debate in House of Lords, 1742, on Bill for Indemnifying Evidence, 12 *Cobbett's Parliamentary History* 675, 693; quoted in 8 Wigmore, *Evidence* § 2192 (McNaughton rev. 1961).

Further, a rule confining full use restriction immunity statutes to interjurisdictional situations has not been shown to be supported by empirical evidence demonstrating that the practical difficulties of policing use restriction in the immunity field are uniquely different from the difficulties of policing use restriction under other exclusionary rules, *or* that an absolute immunity statute is more easily policed than a use restriction statute, *or* that such difficulties as exist are greater in interjurisdictional situations than in intrajurisdictional situations. Both Justice White and Justice Brennan have hypothesized that the likelihood of a prosecution eventuating is greater when only one government is involved. *Murphy, supra*, at 98; *Piccirillo, supra*, at 561. But such a hypothesis, even if true, does not dictate the choice of one kind of immunity statute over another—a choice which must be made in the light of the totality of constitutional and governmental considerations bearing on the present-day adversary system as discussed in this brief.

As Justice White has observed, "the scope of immunity conferred wholly depends on the testimony given," which is true both of full use restriction statutes and absolute immunity statutes. *Murphy, supra* at 99. And he went on to analyze the relative difficulties of proof under the two kinds of immunity statutes, speaking at this point in general terms applicable either to the intrajurisdictional or interjurisdictional situation. His view that absolute immunity statutes pose the greater difficulties of proof merits extensive quotation. The argument that only an absolute immunity statute is constitutionally adequate, he observed, logically would void also all of our exclusionary rules concerning an "illegal search and seizure, an il-



legal wiretap, illegal detention, and coercion." He then said:

Second, there are no real proof problems in this [use restriction] situation. As in the analogous search and seizure and wiretap cases, where the burden of proof is on the Government once the defendant establishes the unlawful search or wiretap . . . once a defendant demonstrates that he has testified in a state proceeding in exchange for immunity to matters related to the federal prosecution, the Government can be put to show that its evidence is not tainted by establishing that it had an independent, legitimate source for the disputed evidence. Since the Government has the relevant information within its control, valid prosecutions need not be sacrificed and infringement on the privilege through use of compelled testimony, direct or indirect, need not be tolerated. It is carrying a premise of perjury and judicial incompetence to excess to believe that this procedure poses any hazards to the rights of an accused.

Third, greater requirements or difficulties of proof by a defendant inhere in the rule of absolute immunity. When a witness testifies under the auspices of an immunity act, the immunity he gets does not secure him from indictment or conviction. . . . The witness must plead and prove, as an affirmative defense, that he has received immunity and that the instant prosecution is on account of a matter testified to in exchange for immunity . . . which may pose considerable difficulties where the relationship between the testimony and the prosecution is not obvious or where the immunity is acquired as a result of testimony before a grand jury or in an *in camera* administrative proceeding. *Murphy, supra*, at 103-104.

To this line of argument, Justice Brennan in *Piccirillo v. New York*, *supra*, objects that "use immunity literally misses half the point of the privilege, for it permits the compulsion without removing the criminality." 400 U.S. at 567. But this statement misconceives the privilege, unless it is now to be rewritten as a full pardon requirement. Full use immunity does remove the *self*-criminality, and that is all the Fifth Amendment requires.

Justice Brennan also hypothesizes various difficulties in single jurisdiction situations, where men working in the same office may exchange information without keeping adequate records, in ascertaining that evidence has an "independent source." Insofar as such a proof problem may exist, and may possibly be more aggravated in the single jurisdiction situation, it does not follow, as he suggests, that the solution can be found in requiring absolute ("transactional") immunity rather than full use restriction immunity. A better solution would be simply to tighten up on the adverse presumption against the government, as a constitutional rule analogous to the *Miranda* warnings as discussed above.

Even if we were willing to pay the very high price of absolute immunity and indulge in immunity baths, absolute immunity has its own serious proof problems which negate its being a solution to the problem hypothesized. For even under absolute immunity there is the difficult matter of proving "relatedness," as already noted. Immunity flows only from the words spoken and to avert a future prosecution the person must show—with the burden on him rather than on the government—not merely a relationship but a substantial relationship between his compelled testimony

and the subsequent prosecution.<sup>36</sup> For inability to carry this burden federal grand jury witnesses have on occasion failed in their immunity plea in subsequent federal prosecution. *Heike v. United States*, 227 U.S. 131 (1914); *Himelfarb v. United States*, 175 F. 2d 924 (9th Cir. 1949), *cert. den.*, 338 U.S. 860 (1949).

The difficulty with the "relatedness" test under an absolute immunity statute is well illustrated by *Piccirillo v. New York*, *supra*, itself. There the New York Court of Appeals, and the three members of this Court who addressed the question, Justices Douglas, Brennan, and Marshall, differed on whether a substantial relationship had been demonstrated. A person who had been hired to assault a housing contractor with tire irons was caught by the police, and subsequently tried unsuccessfully to bribe a policeman to dispose of the irons. After pleading guilty and being sentenced for the assault, he was brought before a grand jury which was investigating possible organized crime conspiracies in connection with assault. Under an assurance of immunity he testified freely concerning the assault agreement and the use of tire irons, but the bribery attempt was not mentioned. Four days later the policeman testified about the bribe attempt before the same grand jury, which subsequently indicted the assaulter, Piccirillo, and a codefendant for bribery. Piccirillo's immunity plea on the bribery charge was denied by the New York Court of Appeals on the ground that neither his testimony nor the fruits thereof were used in obtaining the bribery indictment, and that the New York immunity provision did not offer abso-

<sup>36</sup> On the "exchange theory" of immunity statutes of which the "substantial relationship" test is one element, see Dixon, *supra*, 22 *Geo. Wash. L. Rev.* at 479-80, 555 *et seq.*

lute immunity. *People v. LaBello and Piccirillo*, 24 N.Y. 2d 598 at 605, 301 N.Y.S. 2d 544 at 550, 249 N.E. 2d 412 at 416. Subsequently in a different case the Court of Appeals reinterpreted the statute as offering absolute immunity, but said the conviction of Piccirillo and his codefendant still was correct because they "gave no testimony which related or pertained to the offense for which they were prosecuted and of which they were convicted." *Gold v. Menna*, 25 N.Y. 2d 475 at 482 n. 1, 307 N.Y.S. 2d 33 at 38 n. 1, 255 N.E. 2d 235 at 238 n. 1 (1969).

The "relatedness" issue in *Piccirillo* can be argued two ways. Negatively, it can be argued that the witness did not touch on the bribery in his testimony, and that even his mention of the tire irons did not create a substantial relationship because the state already had its bribery case made out and undoubtedly could have obtained the same indictment from a different grand jury. Such a narrow interpretation would be supported by the "exchange theory" of immunity statutes which underlies *Shapiro v. United States*, 335 U.S. 1 (1948), and also by the "harmless error" principle. Affirmatively, and probably more persuasively, it could be argued that there is a substantial relationship because the tire irons were common to the assault and to the bribery attempt, and thus the witness' assault testimony furnished some corroboration for the policeman's bribery testimony. This was the view of Justices Douglas and Brennan in their separate comments in *Piccirillo*, and it is supported by the wording of absolute immunity statutes.

However, do not the very facts of *Piccirillo* argue against absolute immunity statutes with their possible "gratuity to crime," and for full use immunity statutes



as being the appropriate way to safeguard interests in both the intrajurisdiction and interjurisdiction situations? Even under a full use immunity statute it can be argued that the case was wrongly decided and immunity should have been conferred because of the corroboration element, which is a species of "fruit" derived from the witness' testimony. (The tire irons alone should not be enough to create immunity under a use statute because the police had independent knowledge of them, having caught the defendants in the act of assault.) If the state had used separate grand juries the corroboration element would drop out. Under a full use immunity statute conviction would then be possible, and properly so, on an independent evidence theory. Under an absolute immunity statute, however, the government's case would still be forfeited because of the common element of the tire irons. Thus the investigation of a possible organized crime conspiracy, which was why the convicted assaulter was brought before the grand jury, would cause a gratuitous forfeiture of the concurrent bribery offense for which the government had eyewitness testimony.

In summary, the position that full use restriction immunity is all right in some situations arising under the Fifth Amendment, and not in others, is difficult to sustain either in terms of logic, need, or practicalities of enforcement. The position rests on a questionable "two-level" perception of the Fifth Amendment, as follows: (1) full use restriction in the form of a judicially imposed exclusionary rule is always adequate to remove criminality *after* a disclosure compelled in violation of the Fifth Amendment, whether the context is intrajurisdictional or interjurisdictional; (2) a full use restriction immunity statute provision is adequate

before disclosure, as a way of removing criminality, and opening the way to disclosure, where one jurisdiction seeks the testimony and the feared criminality is under the law of another jurisdiction; (3) but a full use restriction immunity provision is inadequate as a way of compelling disclosure where the jurisdiction which seeks the information is the one which might prosecute.

The first point is supported by *United States v. Blue*, 384 U.S. 251 (1966), discussed *supra*, and all of the exclusionary rule cases. See also Part III of Justice Brennan's concurring opinion in *Mackey v. United States, supra*.<sup>27</sup> The second point flows from *Murphy v. Waterfront Commission, supra*. The third point is the issue posed by Justice Brennan in *Piccirillo*, and by the instant appeal, and the Supreme Court has never had occasion squarely to rule on the question. We submit, however, that the contention that there should be a more stringent rule in the third situation is not supportable. It is not supported by history which indicates that beginning with *Lilburne* the continual demand of proponents of the privilege has been for a full use restriction rule—not a blanket pardon extending even beyond the offense under investigation. Nor is it supported by demonstrable difficulties in implementing the conventional exclusionary rule. As already noted, the burden of proof under a use restriction rule rests

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<sup>27</sup> In the same opinion after discussing *Marchetti-Grosso* Justice Brennan also noted that "if the information has been compelled over a claim of privilege . . . the individual [is to be] protected against the use of that information in state prosecutions under the statutes making criminal the taxed activity, and to complete immunity from prosecution under Federal statutes of like kind." *Mackey*, 91 S. Ct. at 1169. The last three words, to which emphasis has been added, fall short of extending absolute immunity from prosecution under all federal statutes.

on the government, not on the defendant, as under absolute immunity. And as also explained above, the burden of proof in the Fifth Amendment situation may on constitutional grounds be made more stringent than obtains in Fourth Amendment situations.

\* \* \*

We note that the Court of Appeals for the Ninth Circuit, in a case arising under the federal witness immunity act of 1970, 18 U.S.C. Secs. 6001-6005, agrees with the foregoing analysis and conclusion that full use restriction immunity is constitutional in intrajurisdictional context as well as in interjurisdictional context. *Stewart v. United States*, *Kastigar v. United States*, 440 F.2d 954 (9th Cir. 1971), *cert. granted*, 39 U.S.L.W. 3505 (May 17, 1971). This ruling has been followed by another panel in the same Circuit, *Charleston v. United States*, No. 71-1787, and *Herlicy v. United States*, No. 71-1788, June 16, 1971. Two opposing opinions rest on the now traditional misconception of the facts actually at issue in *Counselman*, and hence a misconception of the breadth of the *Counselman* holding. *In the Matter of Korman and Likas*, (No. 71-1328) (7th Cir. May 20, 1971); *In the Matter of Kinoy*, (No. M-11-188) (S.D.N.Y. Jan. 29, 1971).

Full use restriction immunity, without reservation regarding the intrajurisdictional context, is also supported by other authorities, *e.g.*, McCormick, McNaughton, Wigmore, and Mayers.<sup>38</sup> And it may also be noted that the new general federal witness immunity act passed in 1970, 18 U.S.C. Secs. 6001-6005

<sup>38</sup> McCormick, *Handbook of the Law of Evidence*, 285-86 (1954); 8 Wigmore, *Evidence* § 2251 n.1, 2284 (McNaughton rev. 1961); Mayers, *supra* note 3, at 76, 126, 230.

was recommended unanimously by the National Commission on Reform of the Federal Criminal Laws.<sup>89</sup>

**VIII. A FULL USE RESTRICTION IMMUNITY FORMULA, UNLIKE AN ABSOLUTE IMMUNITY FORMULA, COULD OPEN THE WAY TO EXTENDING THE IMMUNITY TECHNIQUE TO RELUCTANT WITNESSES CALLED UNDER DEFENDANTS' SIXTH AMENDMENT RIGHT TO HAVE COMPULSORY PROCESS.**

Looking to the future, it may be hypothesized that use immunity to overcome a plea of the Fifth Amendment, which we feel has been constitutionalized already for the government in such cases as *Murphy* and *Freed*, *supra*, could also work to aid criminal defendants regarding their own recalcitrant defense witnesses. In present operation, immunity is limited to witnesses called by the government, *United States v. Standard Sanitary Manufacturing Company*, 187 F. 232 (C.C.E.D. Pa. 1911), and yet there may be a similar need regarding witnesses called by the defense. It would be unthinkable to empower defense counsel to confer absolute immunity in such situations. It may be suggested, however, that a full use restriction formula could accommodate the competing considerations of fairness to the defendant and avoidance of large-scale defendant-controlled immunity baths. Indeed, making good on defendant's Sixth Amendment "right of compulsory process for obtaining witnesses

<sup>89</sup> See Commission's *Final Report* xi (1971) (Edmund G. Brown, Chairman); see also Commission's Second Interim Report in Hearings on Measures Relating to Organized Crime, Senate Subcommittee on Criminal Laws and Procedures, 91st Cong., 1st Sess. 287 (1969). The measure was approved by the Senate Judiciary Committee without dissent (Report on Organized Crime Control Act of 1969) and by the House Judiciary Committee with only one dissent (Report on Federal Immunity of Witnesses Act, 1970).



in his favor," *Washington v. Texas*, 388 U.S. 14, 23 (1967), may be deemed to require a correlative use immunity provision so that a plea of the Fifth will not vitiate defendant's basic right to have witnesses. In *Earl v. United States*, 361 F. 2d 531 (D.C. Cir. 1966), *pet. for reh. en banc*, 364 F. 2d 666 (1966), *cert. den.* 388 U.S. 921 (1967), this immunity issue was raised but rejected, the Court saying that "the judicial creation of a procedure comparable to that enacted by Congress for the benefit of the Government is beyond our power." 361 F. 2d at 534; *accord*, *Morrison v. United States*, 365 F. 2d 521 (D.C. Cir. 1966). However, in a cautionary footnote the court in the *Earl* case also said:

We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process. Arguments could be advanced that in the particular case the Government could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused. Here we are asked in effect to rewrite a statute so as to make available to the accused a procedure which Congress granted only to the Government. (Emphasis in original.) 361 F. 2d at 534 n. 1.

And commenting on the denial of hearing en banc in *Earl* four judges termed the issue "novel and troublesome," and "likely to recur." 364 F. 2d at 667.

**CONCLUSION**

For the foregoing reasons, New Jersey's full use restriction immunity law is constitutional under the Fifth and Fourteenth Amendments, and the judgment below should be affirmed.

Respectfully submitted,

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July, 1971



**ZICARELLI v. NEW JERSEY STATE COMMISSION  
OF INVESTIGATION**

**APPEAL FROM THE SUPREME COURT OF NEW JERSEY**

**No. 69-4. Argued January 11, 1972—Decided May 22, 1972**

After appellant invoked the Fifth Amendment and refused to answer questions concerning organized crime, racketeering, and political corruption in Long Branch, New Jersey, appellee Commission granted him statutory immunity "from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate . . . ." Appellant still refused to answer, contending that full transactional immunity was required, that the statutory ban on the use and derivative use of "responsive" answers is unconstitutionally vague, and that the immunity would not protect him from foreign prosecution, of which he has a real and substantial fear. Appellant was adjudged to be in contempt and the judgment was upheld on appeal. The New Jersey Supreme Court, construing the responsiveness limitation, held that "the statute protects the witness against answers and evidence he in good faith believed were demanded." Commission procedure provides for an advance statement of the subject matter of the questioning and permits a witness to have counsel present at the hearing. *Held:*

1. The New Jersey statutory immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and is sufficient to compel testimony. *Kastigar v. United States*, ante, p. 441. Pp. 474-476.

2. In light of the State Supreme Court's construction and the context in which the statute operates, the responsiveness limitation is not violative of due process. Pp. 476-478.

3. The self-incrimination privilege protects against real dangers, not remote and speculative possibilities, and here there was no showing that appellant was in real danger of being compelled to disclose information that might incriminate him under foreign law. Pp. 478-481.

55 N. J. 249, 261 A. 2d 129, affirmed.



POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., *post*, p. 481, and MARSHALL, J., *post*, p. 481, filed dissenting statements. BRENNAN and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Michael A. Querques argued the cause for appellant. With him on the brief were Daniel E. Isles, Harvey Weissbard, and Joseph E. Brill.

Andrew F. Phelan argued the cause and filed a brief for appellee.

George F. Kugler, Jr., Attorney General, argued the cause for the State of New Jersey as *amicus curiae* urging affirmance. With him on the brief were Barry H. Evenchick and Michael R. Perle, Deputy Attorneys General.

Melvin L. Wulf filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

Robert G. Dixon, Jr., filed a brief for the National District Attorneys Association et al. as *amicus curiae* urging affirmance.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case, like *Kastigar v. United States*, *ante*, p. 441, raises questions concerning the conditions under which testimony can be compelled from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination.

The New Jersey State Commission of Investigation<sup>1</sup> subpoenaed appellant to appear on July 8, 1969, to testify concerning organized crime, racketeering, and

<sup>1</sup> The New Jersey Legislature created the Commission primarily to investigate organized crime, racketeering, and political corruption in New Jersey. N. J. Rev. Stat. §§ 52:9M-1 and 52:9M-2 (1970 and Supp. 1971-1972).

political corruption in Long Branch, New Jersey.<sup>2</sup> In the course of several appearances before the Commission, he invoked his privilege against self-incrimination and refused to answer a series of 100 questions. The Commission granted him immunity pursuant to N. J. Rev. Stat. § 52:9M-17 (a) (1970), and ordered him to answer the questions. Notwithstanding the grant of immunity, he persisted in his refusal to answer. The Commission then petitioned the Superior Court of Mercer County for an order directing appellant to show cause why he should not be adjudged in contempt of the Commission and committed to jail until such time as he purged himself of contempt by testifying as ordered. At the hearing on the order to show cause, appellant challenged the order to testify on several grounds, one of which was that the statutory immunity was insufficient in several respects to compel testimony over a claim of the privilege. The Superior Court rejected this contention, and ordered appellant incarcerated until such time as he testified as ordered. The Supreme Court of New Jersey certified appellant's appeal before argument in the Appellate Division, and affirmed the judgment of the Superior Court. *In re Zicarelli*, 55 N. J. 249, 261 A.2d 129 (1970). This Court noted probable jurisdiction and set the case for argument to consider appellant's challenges to the sufficiency of the immunity authorized by the statute. 401 U. S. 933 (1971.)

# I

A majority of the members of the Commission have authority to confer immunity on a witness who invokes

<sup>2</sup> The New Jersey Code of Fair Procedure requires that persons summoned to testify before the Commission be served prior to the time they are required to appear with a statement of the subject of the investigation. N. J. Rev. Stat. § 52:13E-2 (1970). The subpoena served on appellant contained this statement. App. 3a.

the privilege against self-incrimination.<sup>2</sup> After the witness testifies under the grant of immunity, the statute provides that:

"he shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate, except that such person may nevertheless be prosecuted for any perjury committed in such answer or in producing such evidence, or for contempt for failing to give an answer or produce evidence in accordance with the order of the commission . . . ." N. J. Rev. Stat. § 52:9M-17 (b) (1970).

This is a comprehensive prohibition on the use and derivative use of testimony compelled under a grant of immunity.<sup>4</sup> Appellant contends that only full transactional immunity affords protection commensurate with that afforded by the privilege and suffices to compel testimony over a claim of the privilege. We rejected this argument today in *Kastigar*, where we held that immunity from use and derivative use is coextensive with the scope of the privilege, and is therefore sufficient to compel testimony. We perceive no difference between the degree of protection afforded by the New Jersey statute and that afforded by the federal statute sustained in *Kastigar*.

Appellant also contends that while immunity from use and derivative use may suffice to secure the protection of the privilege from invasion by jurisdictions other than the jurisdiction seeking to compel testimony, that jurisdiction must grant the greater protection afforded by transactional immunity. In *Kastigar*, we held that

<sup>2</sup> N. J. Rev. Stat. § 52:9M-17 (a) (1970).

<sup>4</sup> See *In re Zicarelli*, 55 N. J. 249, 270, 261 A.2d 129, 140 (1970).

immunity from use and derivative use is commensurate with the protection afforded by the privilege, and rejected the notion that in our federal system a jurisdiction seeking to compel testimony must grant protection greater than that afforded by the privilege in order to supplant the privilege and compel testimony. Our holding in *Kastigar* is controlling here.

## II

Appellant contends that the immunity provided by the New Jersey statute is unconstitutionally vague because it immunizes a witness only against the use and derivative use of "responsive" answers and evidence, without providing statutory guidelines for determining what is a "responsive" answer. The statute does not come to us devoid of interpretation, for the Supreme Court of New Jersey construed the responsiveness limitation as follows:

"The limitation is intended to prevent a witness from seeking undue protection by volunteering what the State already knows or will likely come upon without the witness's aid. The purpose is not to trap. Fairly construed, the statute protects the witness against answers and evidence he in good faith believed were demanded." 55 N. J., at 270-271; 261 A. 2d, at 140.

This is not the technical construction of "responsive" in the legal, evidentiary sense that appellant fears,<sup>5</sup> but, rather, is a construction cast in terms of ordinary English usage<sup>6</sup> and the good-faith understanding of the average man. The term "responsive" in ordinary English usage has a well-recognized meaning. It is not,

<sup>5</sup> See 3 J. Wigmore, Evidence § 785, pp. 200-202 (J. Chadbourn rev. 1970).

<sup>6</sup> Cf. *Malloy v. Hogan*, 378 U. S. 1, 12. (1964); *Hoffman v. United States*, 341 U. S. 479, 487 (1951).



as appellant argues, "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U. S. 385, 391 (1926).

Moreover, the contention that ambiguity in the term "responsive" poses undue hazards for a witness testifying under a grant of immunity must be considered in the context in which the statute operates. This is not a penal statute that requires an uncounseled decision by a layman as to what course of action is lawful to pursue. A witness before the Commission is entitled to have in advance of his testimony a statement of the subject matter on which the Commission intends to examine him.<sup>7</sup> This advance notice of the subject of the inquiry will provide a background and context that will aid a witness in determining what information the questions seek. The New Jersey statute further provides that a witness before the Commission is entitled to have counsel present during the course of the hearing,<sup>8</sup> and counsel may secure clarification of vague or ambiguous questions in advance of a response by the witness.<sup>9</sup> The responsiveness limitation is not a trap for the unwary; rather it is a barrier to those who would intentionally tender information not sought in an effort to frustrate and prevent criminal prosecution.<sup>10</sup> The con-

<sup>7</sup> N. J. Rev. Stat. § 52:13E-2 (1970).

<sup>8</sup> N. J. Rev. Stat. § 52:13E-3 (1970).

<sup>9</sup> Appellant does not contend that counsel, although present, is so limited in his role that he cannot obtain clarification of any questions that the witness does not understand fully. Counsel for the Commission states that a witness may even object to questions on the ground that they are not relevant to the subject matter of the inquiry, and obtain a court ruling on relevancy before being required to answer. Appellee's Brief 81-82.

<sup>10</sup> *In re Zicarelli*, 55 N. J., at 270-271, 261 A. 2d, at 140. See generally Comment, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L. J. 1568, 1572 (1963).

text in which the statute operates<sup>11</sup> reaffirms our conclusion that the responsiveness limitation does not violate the Due Process Clause of the Fourteenth Amendment.

### III

Appellant further asserts that he cannot be compelled to testify before the Commission because his testimony would expose him to danger of foreign prosecution. He argues that he has a real and substantial fear of foreign prosecution, and that he cannot be compelled to incriminate himself under foreign law. It follows, he insists, that he cannot be compelled to testify, irrespective of the scope of the immunity he receives, because neither the New Jersey statute nor the Fifth Amendment privilege can prevent either prosecution or use of his testimony by a foreign sovereign. This Court noted probable jurisdiction to consider appellant's claim that a grant of immunity cannot supplant the Fifth Amendment privilege with respect to an individual who has a real and substantial fear of foreign prosecution. We have concluded, however, that it is unnecessary to reach the constitutional question in this case.

It is well established that the privilege protects against real dangers, not remote and speculative possibilities.<sup>12</sup> At the hearing before the Superior Court of Mercer County, appellant introduced numerous newspaper and magazine articles bearing upon his self-incrimination claim. He called a number of these articles to the court's attention in an effort to demonstrate the basis of a fear

<sup>11</sup> Appellant refused to answer 100 questions. None of these questions is pointed to as an example of a question that is so vague that an ordinary man could not determine what information the question seeks.

<sup>12</sup> *E. g.*, *Mason v. United States*, 244 U. S. 362 (1917); *Heike v. United States*, 227 U. S. 131, 144 (1913); *Brown v. Walker*, 161 U. S. 591, 599-600 (1896); *Queen v. Boyes*, 1 B. & S. 311, 329-331, 121 Eng. Rep. 730, 738, (Q. B. 1861).

of foreign prosecution.<sup>13</sup> These articles labeled appellant the "foremost internationalist" in organized crime,<sup>14</sup> and detailed his alleged participation in unlawful ventures growing out of alleged interests and activities in Canada<sup>15</sup> and the Dominican Republic.<sup>16</sup>

While these articles would lend support to a claim of fear of foreign prosecution in the abstract, they do not support such a claim in the context of the questions asked by the Commission. Of the 100 questions he refused to answer, appellant cites only one specific question<sup>17</sup> as posing a substantial risk of incrimination

<sup>13</sup> Cf. *Hoffman v. United States*, 341 U. S., at 489.

<sup>14</sup> *Life*, Sept. 8, 1967, p. 101.

<sup>15</sup> *Life*, Aug. 9, 1968, p. 24.

<sup>16</sup> *Life*, Sept. 8, 1967, p. 101. Appellant also alleges that these articles support his claim of a real and substantial danger of prosecution by Venezuela. The only reference to Venezuela, however, is a statement that appellant "has holdings in Venezuela." *Life*, Sept. 1, 1967, at 45.

<sup>17</sup> Appellant also raises a vague objection on grounds of incrimination under foreign law to these five questions:

"Q. Are you a member of any secret organization that is dedicated to or whose principle is to pursue crime and protect those of its members who do commit crime?" App. 8a.

"Q. Do you know that organization by the name Cosa Nostra?" App. 17a.

"Q. Are you a member of the organization known as Cosa Nostra?" App. 18a.

"Q. In whose family of Cosa Nostra are you a member?"

"Q. Do you know Joseph Bonanno?" App. 20a.

These questions do not seek answers concerning foreign involvements or foreign criminal activity. Indeed, they do not relate to criminal acts. Nor is it even remotely likely that their answers could afford "a link in the chain of evidence" needed to prosecute appellant in a foreign jurisdiction. Cf. *Blau v. United States*, 340 U. S. 59, 161 (1950). For if appellant identified himself as a member of the Cosa Nostra in the "family" of Joseph Bonanno, he would only confirm an assumption widely held by law enforcement authorities. See, e. g., S. Rep. No. 91-617, p. 38 (1969). To confirm the operating assumption of law enforcement authorities hardly provides a new "link" to evidence that could be used in a foreign prosecution.

under foreign law. That question is: "In what geographical area do you have Cosa Nostra responsibilities?"

We think it plain from the context in which the question was asked that it sought an answer concerning geographical areas in New Jersey. The subject of the hearing was law enforcement, organized crime, racketeering, and political corruption in the city of Long Branch, which is located in Monmouth County, New Jersey. Eleven of the 13 questions preceding the question under consideration related specifically to the city of Long Branch and Monmouth County.<sup>18</sup> Of course, neither the fact that the Commission was not seeking information concerning appellant's activities outside the United States, nor the fact that the question was not designed to elicit such information, is dispositive of appellant's claim that an answer to the question would incriminate him under foreign law. When considering whether a claim of the privilege should be sustained, the court focuses inquiry on what a truthful answer might disclose, rather than on what information is expected by the questioner.<sup>19</sup> But the context in which a question is asked imparts additional meaning to the question, and clarifies what information is sought. A question to which a claim of the privilege is interposed must be considered "in the setting in which it is asked." *Hoffman v. United States*, 341 U. S. 479, 486 (1951).

Considering this question in light of the circumstances in which it was asked, we agree with the conclusion of the Supreme Court of New Jersey that appellant was never in real danger of being compelled to disclose information that might incriminate him under foreign law. Even if appellant has international Cosa Nostra responsibilities, he could have answered this question truth-

<sup>18</sup> The question under consideration was followed by the question: "Is Monmouth County within that geographical area?"

<sup>19</sup> See *Hoffman v. United States*, 341 U. S. 479 (1951).



fully without disclosing them. Should he have found it necessary to qualify his answer by confining it to domestic responsibilities in order to avoid incrimination under foreign law, he could have done so. To have divulged international responsibilities would have been to volunteer information not sought, and apparently not relevant to the Commission's investigation. We think that in the circumstances of the questioning this was clear to appellant and his counsel.

Appellant is of course free to purge himself of contempt by answering the Commission's questions. Should the Commission inquire into matters that might incriminate him under foreign law and pose a substantial risk of foreign prosecution, and should such inquiry be sustained over a relevancy objection,<sup>20</sup> then a constitutional question will be squarely presented. We do not believe that the record in this case presents such a question.

The judgment of the Supreme Court of New Jersey accordingly is

*Affirmed.*

MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS dissents for the reasons stated in his dissenting opinion in *Kastigar, ante*, p. 462.

MR. JUSTICE MARSHALL dissents for the reasons stated in his dissenting opinion in *Kastigar, ante*, p. 467.

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<sup>20</sup> See n. 9, *supra*.